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Supreme Court of the United States

OCTOBER TERM, 1997

E. K. McDANIEL, Warden, Ely State Prison; ROBERT BAYER, Director, Nevada Department of Prisons; FRANKIE SUE DEL PAPA, Attorney General of the State of Nevada,

Cross-Petitioners,

v.

GERALD ARMOND GALLEGO,

Cross-Respondent.

CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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CAPITAL CASE

QUESTIONS PRESENTED

1. WHETHER THE COURT OF APPEALS WAS REQUIRED TO CONDUCT A HARMLESS ERROR ANALYSIS PURSUANT TO *BRECHT V. ABRAHAMSON*, 507 U.S. 619 (1993), AFTER IT FOUND THAT AN EXECUTIVE CLEMENCY INSTRUCTION VIOLATED THE EIGHTH AMENDMENT.

2. WHETHER THE COURT OF APPEALS INCORRECTLY DETERMINED IN AN THAT THE EXECUTIVE CLEMENCY INSTRUCTION VIOLATED THE EIGHTH AMENDMENT.

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CONDITIONAL CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

TO THE HONORABLE JUSTICES OF THE SUPREME COURT:

COME NOW, Cross-Petitioners above-named, and file this conditional cross-petition for a writ of certiorari seeking an order vacating the September 4, 1997, Order of the United States Court of Appeals for the Ninth Circuit (Ninth Circuit or circuit court), whereby the Cross-Respondent's (Gallego) death sentence was vacated.

OPINIONS AND JUDGMENTS BELOW

The Opinion of the Nevada Supreme Court was filed on December 20, 1985. (Appendix A). The Opinion of the Federal District Court for the District of Nevada was filed February 7, 1997. (Appendix B). The Opinion of the Ninth Circuit was filed on September 7, 1997. (Appendix C).

JURISDICTIONAL STATEMENT

The federal district court reviewed the matter filed as a Petition for Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2254 by a Person in State Custody. Appendix B. Following the denial of the petition, Gallego appealed to the United States Court of Appeals for the Ninth Circuit. Appendix C. The Ninth Circuit affirmed in part, reversed in part, and remanded with instructions in an opinion filed September 4, 1997. *Id.* Gallego filed a petition for rehearing which was denied on November 18, 1997. Appendix D. Gallego's petition for writ of certiorari was placed on the docket on March 4, 1998. Pursuant to Sup. Ct. R. 12.5, this cross-petition for writ of certiorari[1] is

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[1] Cross-Petitioners advise that they, in good faith, previously attempted to file their petition for writ of certiorari in this Court. It was subsequently returned unfiled on the basis of

filed within thirty (30) days after the date Gallego's case was placed on the docket.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. VIII. Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Nev. Rev. Stat. 213.1099-3 (provision enacted 1981 Nev. Stat. 873). (Appendix E).

STATEMENT OF THE CASE

The State has lawful custody of Gallego pursuant to his conviction by a jury of two counts of first-degree murder and two counts of first-degree kidnapping with substantial bodily harm. Appendix A. Gallego was sentenced to death by the jury following a penalty hearing for the two murder convictions. *Id.* Gallego was also

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untimeliness. Cross-Petitioners further advise that their motion for extension of time to file petition for writ of certiorari and for leave to file petition for writ of certiorari is pending before this Court requesting that acceptance of the first petition be granted. In the event that said motion is granted, Cross-Petitioners request that their cross-petition be deemed moot and that their original petition be deemed independent of Gallego's petition.

sentenced to two consecutive sentences of life without the possibility of parole for the kidnapping convictions. *Id.*

Gallego appealed to the Nevada Supreme Court. Appendix A. On December 20, 1985, the Nevada Supreme Court affirmed the judgments of conviction and the sentences. *Gallego v. State*, 711 P.2d 856 (Nev. 1985). Appendix A. On October 6, 1986, the United States Supreme Court denied Gallego's petition for writ of certiorari. *Gallego v. Nevada*, 479 U.S. 871 (1986).

Gallego subsequently filed an unsuccessful petition for post-conviction relief. Appendix B at 18.

Gallego filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the District of Nevada. Appendix B at 18. The petition was dismissed without prejudice to afford Gallego the opportunity to exhaust his claims. *Id.* at 18.

Gallego filed a state petition for writ of habeas corpus which was dismissed. Appendix B at 18. Gallego's petition for writ of certiorari was denied. *See Gallego v. Nevada*, 508 U.S. 914 (1993).

On September 15, 1993, Gallego filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the District of Nevada.

Gallego originally presented 40 grounds for relief. Appendix B. Ground 40 was dismissed, but was allowed to be incorporated into Grounds 22 through 39. *Id.* at 1. Gallego abandoned Grounds 13, 15, 16, 17, 23, 26, 27, 28, 29, 31, 32, 35 and 37. *Id.* at 1. The federal district court dismissed Grounds 22, 24, 25, 30, 33, 34, 36, 38 and 39 as procedurally defaulted. *Id.* at 1, 2. The equal protection and due process portions of Grounds 2 and 3 and the portion of Ground 11 alleging that reasonable doubt was improperly defined were dismissed as an abuse of the writ. *Id.* at 2.

In addition, the federal district court dismissed a portion of Ground 21 as unexhausted and because it failed to state a cognizable ground for relief. Appendix B at 2. In its decision, the federal district court considered the remaining issues. *Id.* at 2. The federal district court denied Gallego's petition for habeas relief. Appendix B at 68. Gallego appealed from that decision to the Ninth Circuit. Appendix C. *Gallego v. McDaniel*, 124 F.3d 1065 (9th Cir. 1997). The Ninth Circuit affirmed the federal district in all respects except one. Appendix C. The Ninth Circuit reversed the federal district court's determination on Ground 10 which challenged the clemency

instruction and remanded the case with instructions. Appendix C at 43. *Gallego*, 124 F.3d at 1079. Gallego sought rehearing and suggested rehearing en banc, however, Gallego's petition was denied and his suggestion rejected. Appendix D.

If this Court grants Gallego's petition for writ of certiorari, this Court should also grant Cross-Petitioners' petition and review the circuit court's order for the reasons described below.

SUMMARY OF THE ARGUMENT

The Ninth Circuit disregarded principles of comity and federalism when it failed to conduct a harmless error analysis pursuant to *Brecht v. Abrahamson*, 507 U.S. 619 (1993), after finding fault with the executive clemency instruction given in this case. The circuit court also erred when it determined that the clemency instruction given during the penalty phase violated the Eighth Amendment and contravened *California v. Ramos*, 463 U.S. 992 (1983). The Ninth Circuit applied an incorrect standard when it made that determination. Additionally, the Ninth Circuit improperly incorporated into its analysis *Simmons v. South Carolina*, 512 U.S. 154 (1994), a case having no proper bearing on the issue at hand. The Ninth Circuit's

reliance on and incorporation of *Simmons* into the analysis was improper because it applied a rule to this case whose application is barred by *Teague v. Lane*, 489 U.S. 288 (1989). The Ninth Circuit improperly created and applied a new rule to the issue presented by Gallego for review.

REASONS FOR GRANTING THE WRIT

I. THE COURT OF APPEALS WAS REQUIRED TO CONDUCT A HARMLESS ERROR ANALYSIS PURSUANT TO *BRECHT V. ABRAHAMSON*, 507 U.S. 619 (1993), AFTER IT FOUND THAT AN EXECUTIVE CLEMENCY INSTRUCTION VIOLATED THE EIGHTH AMENDMENT.

If this Court grants Gallego's petition for writ of certiorari, this Court should also grant Cross-Petitioners' conditional cross-petition for writ of certiorari. Granting the conditional cross-petition for writ of certiorari in this case would permit this Court to correct the error committed by the Ninth Circuit Court of Appeals. More importantly, granting the conditional cross-petition would allow this Court to resolve a question important to all states and federal courts involved in federal habeas litigation regarding the scope and applicability of *Brecht* harmless error analysis. It would allow this Court to decide whether (assuming that the instruction was erroneous) the giving of an executive clemency instruction during the penalty phase

of a capital trial that "could have prompted the jury into making erroneous speculations about the kind of sentence that Gallego might actually have to serve" is subject to harmless-error analysis pursuant to *Brecht*. This Court would then also resolve the question whether the giving of such an instruction was "trial error" or "structural error." Additionally, this Court could then also resolve the method by which the harmless error analysis is to be conducted describing an analytical approach tailored more precisely to the nature of the particular error and its relationship to the fairness of the proceedings.

The conditional cross-petition should also be granted because the Ninth Circuit has entered a decision on an important federal question in a way that conflicts with a decision by a state court of last resort. *See* Rule 10(a) of the Rules of the Supreme Court of the United States. The Ninth Circuit, contrary to the Nevada Supreme Court, found that an executive clemency instruction given in a Nevada capital case violated the precepts of *California v. Ramos*, 403 U.S. 992 (1983). *See* Appendices A and C. This issue is of great concern to the State of Nevada because of its potential additional adverse effects on Nevada Supreme Court decisions in capital cases that

preceded *Geary v. State*, 112 Nev. 1434, 1444, 930 P.2d 719, 726 (1996), and *Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985), as well as those cases preceding Gallego's in which the same or similar executive clemency instructions were used. *See e.g. Rogers v. State*, 101 Nev. 457, 705 P.2d 664 (1984). *See* Appendix A at 16, 17.

The resolution of the question presented would define the scope of the applicability of and the circumstances when harmless error analysis pursuant to *Brecht* must be conducted. This Court would decide whether or not a harmless error analysis should have been conducted following the court of appeals' determination that the giving of the instruction in this case was constitutionally erroneous, not because the instruction was inaccurate, but because it "could have prompted the jury into making erroneous speculations about the kind of sentence that Gallego might actually have to serve." (Appendix C at 32). By focusing on the mere possible effect of the alleged error at the time of the sentencing, the Ninth Circuit missed the broader and more important point that Gallego's proceeding reached neither an unreliable or unfair result.

Granting the conditional cross-petition would allow this Court to determine whether such error constitutes

"structural error" or is subject to harmless error analysis. This case would therefore allow this Court to determine where, on the spectrum of error (assuming there is such error), an error in the giving of an executive clemency instruction lies.

The issue before the Court is whether the error identified by the Ninth Circuit in *Gallego v. McDaniel*, 124 F.3d 1065 (9th Cir. 1997) can be considered harmless. If it can be so considered, this Court must determine the applicable standard in making such a determination. In *Brecht*, 507 U.S. 627-630, the Supreme Court held that "trial error" ought to be evaluated on habeas review under the standard enunciated earlier in *Kotteakos v. United States*, 328 U.S. 750 90 L.Ed. 1557 (1946). "Trial error occurs during the presentation of the case to the jury." *Id.*, 507 U.S. at 629 (*quoting Arizona v. Fulminante*, 499 U.S. 279, 307 (1991)). Trial error is susceptible to harmless error analysis because it may be quantitatively assessed in the context of the other evidence that is presented at trial. *Id.* This Court held in *Brecht*, that a reviewing court must determine whether the error "'had substantial and injurious effect or influence in determining the jury's verdict.'"

Brecht, 507 U.S. at 637 (*quoting Kotteakos*, 328 U.S. at 776).

At the other end of the spectrum are structural defects in the trial mechanism that infect the entire trial process," *Id.* 507 U.S. at 629, and therefore require automatic reversal. "Trial error" usually involves the admissibility of evidence or the propriety of the argument of counsel. Here, however, is presented another form of error that arises in the course of trial—instructional error. It is well established at this point that instructional error must be assessed differently from other errors that arise in the course of trial. Some are "structural" in nature and not at all subject to harmless error analysis. *See Sullivan v. Louisiana*, 508 U.S. 275 (1993) (holding that a constitutionally deficient reasonable-doubt instruction cannot be harmless error). On the other hand, other instructions that misstate the task of the jury in assessing the evidence before it are subject to harmless error analysis. *See Carella v. California*, 491 U.S. 263, 266-67 (1989) (holding that an instruction that a rental car kept five days past the rental agreement "shall be presumed to have been embezzled" impermissibly shifts the burden of proof, but is subject to harmless error analysis); *Rose v.*

Clark, 478 U.S. 570, 582 (1986) (holding that an instruction that impermissibly shifts the burden of proof on the issue of malice in a murder prosecution is subject to harmless error analysis); *Sandstrom v. Montana*, 442 U.S. 510, 526-27 (1979) (holding that constitutionally erroneous instruction establishing conclusive presumption that perpetrator intends the ordinary consequences of voluntary acts is subject to harmless error analysis).

Assuming that there was instructional error in this case, such error is subject to harmless error analysis pursuant to *Brecht*. This Court has applied harmless error analysis to a wide range of instructional errors and has recognized that most constitutional errors can be harmless. *See, e.g.*, *Clemons v. Mississippi*, 494 U.S. 738, 752-754 (1990) (unconstitutionally overbroad jury instructions at the sentencing stage of a capital case); *Carella v. California*, 491 U.S. 263, 266 (1989) (jury instruction containing an erroneous conclusive presumption); *Pope v. Illinois*, 481 U.S. 497 (1987) (jury instruction misstating an element of the offense); *Rose v. Clark*, 478 U.S. 570 (1986) (jury instruction containing erroneous rebuttable presumption); *Hopper v. Evans*, 456 U.S. 605 (1982) (statute improperly forbidding trial court's giving a jury instruction on a lesser

included offense in a capital case in violation of the Due Process Clause); and *California v. Roy*, ___ U.S. ___, 117 S.Ct. 337 (1996) (jury instruction that defined crime without including the statement that the jury was required to find that the defendant had intent to commit or facilitate crime).

The common thread connecting these and other cases is that each involved "trial error" which occurred during the presentation of the case to the jury, and which may therefore be quantitatively assessed in the context of the evidence presented in order to determine whether is admission was harmless. *See also Smith v. Dixon*, 14 F.3d 956 (4th Cir. 1994), *cert. denied*, 513 U.S. 841 (1994) (unconstitutionally vague instruction on an aggravating factor in a capital case); *Williams v. Calderon*, 52 F.3d 1465 (9th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 937 (1996) (failure to properly instruct on kidnapping special circumstance subject to harmless error analysis under *Brecht*); and *Hanna v. Riveland*, 87 F.3d 1034 (9th Cir. 1996) (permissive inference jury instruction violative of the Due Process Clause subject to harmless error analysis under *Brecht*).

Any instructional error in this case is properly classified as trial error and, therefore subject to harmless error analysis. The only instructional error that this Court has not found to be subject to harmless error is a constitutionally deficient reasonable doubt instruction. *See Sullivan v. Louisiana*, *supra*.

Yet, the circuit court treated the error it found to exist as structural error. Gallego has no constitutional right to executive clemency. The question whether or not a State may inform a jury during the penalty phase of a capital trial that a defendant may receive executive clemency is left to the states. *Ramos*, 463 U.S. at 1001, 1013. Therefore, an instruction that accurately states that a defendant may be the subject of executive clemency but which "may have prompted the jury into making erroneous speculations about the kind of sentence a person might actually have to serve" is subject to harmless error analysis; and because the matter is being collaterally attacked in a federal habeas proceeding it, is subject to harmless error analysis pursuant to *Brecht*.

The State cited *Brecht v. Abrahamson*, 507 U.S. 619 (1993), in its answer to the district court. It argued that any error in Gallego's trial constituted harmless error.

The federal district court did not find error in Gallego's trial and, therefore, did not conduct a harmless error analysis. In the Ninth Circuit, the State again argued that any error in Gallego's trial constituted harmless error. The Ninth Circuit determined there was error in Gallego's penalty phase but did not conduct a harmless error analysis. Appendix C. The Ninth Circuit erred by failing to conduct such an analysis.

There must be more than "a 'reasonable possibility' that trial error contributed to the verdict"; habeas petitioners are entitled to habeas relief based on trial error only if the error resulted in "actual prejudice." *Brecht*, 507 U.S. 637-638. On collateral appeal, relief is granted for a constitutional error where it "'had [a] substantial and injurious effect or influence in determining the jury's verdict.'" *Brecht v. Abrahamson*, 507 U.S. at 637 (1993) (*quoting Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). If the error does not rise to that level, it is considered harmless. *Bonin v. Calderon*, 59 F.3d 815, 824 (9th Cir. 1995), *cert. denied*, ___ U.S. ___, 116 S.Ct. 718 (1996). "When a federal judge in a habeas proceeding is in grave doubt as to whether a trial error of federal law had a 'substantial and injurious effect or influence in determining

the jury's verdict,' that error is not harmless. And, the petitioner must win." *O'Neal v. McAninch*, 513 U.S. 432, 436 (1995).

The Ninth Circuit, having found error in the giving of the executive clemency instruction, penalty phase Instruction No. 6, should have conducted a harmless error analysis. Instead, the Ninth Circuit truncated the necessary analysis by merely concluding that the jury instruction "could have prompted the jury into making erroneous speculations about the kind of sentence that Gallego might actually have to serve." Appendix C at 32. That determination is insufficient to either warrant or grant federal habeas relief.

This Court has stated "that the burden of justifying federal habeas relief for state prisoners is 'greater than the showing required to establish plain error on direct appeal.'" *Engle v. Isaac*, 456 U.S. 107 at 134-35 (1982), *quoting United States v. Frady*, 456 U.S. 152, 166 (1982). The Ninth Circuit failed to apply *Brecht* and conduct a harmless error analysis. Thus, the Ninth Circuit applied the wrong standard, erroneously reversed the federal district court and granted federal habeas relief.

The Ninth Circuit failed to continue the required analysis and give the answer to the following question: Assuming that giving the executive clemency instruction was error, did the instruction have a substantial and injurious effect on the jury's verdict? This default on the part of the circuit court relieved Gallego from his burden to show that the giving of the instruction had a substantial and injurious effect on the jury's verdict. *See O'Neal v. McAninch*, 513 U.S. 432, 436 (1995); *Castillo v. Stainer*, 997 F.2d 669 (9th Cir. 1993), *cert. denied*, 510 U.S. 1014 (1993); *Burks v. Borg*, 27 F.3d 1424, 1431 n.4 (9th Cir. 1994), *cert. denied by Celestine v. Rocha*, 513 U.S. 1095 (1995), and *cert. denied by Burks v. Borg*, 513 U.S. 1160 (1995). It removed from the calculus any consideration that Gallego's crimes and all of the other information presented to the jury at sentencing were so compelling that a federal court would be required to conclude that the jury instruction did not have a substantial and injurious effect on the jury's verdict of death.

The mere conclusion by the Ninth Circuit that the jury instruction "could have prompted the jury into making erroneous speculations about the kind of sentence that Gallego might actually have to serve," (Appendix C at 32)

and that "the instructions as given inadequately stated the law as applied to the facts of Gallego's case, . . ." (Appendix C at 33, 34), were insufficient to warrant federal habeas relief. The Ninth Circuit failed to apply this Court's standard set forth in *Brecht*.

If the Ninth Circuit had completed its analysis, that court should have determined that Gallego's crimes and the information presented to the jury during the penalty phase of the trial was of such a compelling nature that the giving of the jury instruction did not have a substantial and injurious effect on the jury's verdict. The Ninth Circuit's analysis simply stopped with the determination that "the instructions as given inadequately stated the law as applied to the facts of Gallego's case, . . ." Appendix C at 33, 34. Even if that is true, habeas relief should not be forthcoming automatically.

II. THE COURT OF APPEALS INCORRECTLY DETERMINED THAT THE EXECUTIVE CLEMENCY INSTRUCTION VIOLATED THE EIGHTH AMENDMENT.

The Ninth Circuit, citing *Hamilton v. Vasquez*, 17 F.3d 1149, 1160 (9th Cir. 1994), *cert. denied sub. nom. Calderon v. Hamilton*, 512 U.S. 1220 (1994), recited the

test to be applied to determine whether Instruction No. 6 violated the Eighth Amendment, stating:

> In analyzing whether a sentencing phase instruction violates the Eighth Amendment, a court must determine if there is a reasonable likelihood that the jury applied the instruction in such a way that prevented consideration of relevant mitigating evidence. A penalty phase instruction violates the Eighth Amendment if it prevents the jury from giving a reasoned moral response to the petitioner's mitigating evidence, or creates the risk that the death penalty would be imposed despite evidence which may call for a life sentence. (Internal citations omitted).

Appendix C at 31.

Examination of the Ninth Circuit's Opinion reveals that it did not satisfy its own standard. Assuming that the Ninth Circuit sought to find an Eighth Amendment violation, even then there was no determination that "there was a reasonable likelihood that the jury applied the instruction in such a way that prevented consideration of relevant mitigating evidence." *Hamilton*, 17 F.3d at 1160. There is more than a semantic difference between the Ninth Circuit's finding that Instruction No. 6 "*could have prompted* the jury into making erroneous speculations about the kind of sentence Gallego might actually have to serve," and a finding that "there was a reasonable likelihood that the jury applied the instruction in such a way that prevented

consideration of relevant mitigating evidence." The Ninth Circuit did not apply or satisfy the standard it recited for determining the existence of an Eighth Amendment violation in this case.

Furthermore, the Ninth Circuit's analysis regarding the issue is incorrect. Gallego alleged in Ground 10 that:

> The trial court denied petitioner a fair penalty hearing and due process of law by instructing the jury at the penalty hearing that executive clemency was available to a person sentenced to life without possibility of parole.

Appendix B at 42.

At the penalty phase of Gallego's trial, the jury received the following instructions:

> Instruction No. 5, states:
>
> The punishment of death may be imposed only if one or more of the aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances.
>
> Otherwise, the punishment imposed shall be imprisonment in the state prison for life with or without the possibility of parole.
>
> You are instructed that the sentence of life imprisonment without the possibility of parole does not exclude executive clemency.
>
> If the punishment is fixed at life imprisonment with the possibility of parole,

eligibility for parole begins when a minimum of ten years has been served.

Appendix C at 26, 27.

Instruction No. 6.

Executive clemency involves a decision by the State Board of Pardon Commissioners to commute or reduce a defendant's sentence from life without possibility of parole to life with possibility of parole.

Executive clemency may also involve a decision by the State Board of Pardon Commissioners to shorten the time a defendant is eligible for parole.

The State Board of Pardon Commissioners consists of the Governor, the Attorney General, and the five Justices of the Supreme Court of the State of Nevada. The Board can change a sentence only by a majority vote, and only if the Governor is in the majority voting to change the sentence.

Appendix C at 27.

Gallego objected to the second of these instructions (viz., Jury Instruction 6), and asked the court to give the following instruction instead:

Regarding the possible punishments, you are instructed as follows:

1. Life imprisonment with the possibility of parole is a sentence to life imprisonment which provides that the Defendant would be eligible for parole after a period of ten years. This does not mean that he would be paroled after ten years, but only that he would be eligible after that period of time.

> 2. Life imprisonment without the possibility of parole means exactly what it says, that the Defendant shall not be eligible for parole.
>
> 3. If you sentence the Defendant to death, you must assume that the sentence will be carried out. (Defendant's Instruction C). The trial court refused to give Gallego's proposed instruction "because [it is] not the law."

Appendix C at 27, 28. *Gallego v. McDaniel*, 124 F.3d at 1074.

"In analyzing whether a sentencing phase instruction violates the Eighth Amendment, a court must determine if there is a reasonable likelihood that the jury applied the instruction in such a way that prevented consideration of relevant mitigating evidence." *Hamilton v. Vasquez*, 17 F.3d 1149, 1160 (9th Cir.) (*citing Boyde v. California*, 494 U.S. 370, 380 (1990), *cert. denied sub nom. Calderon v. Hamilton*, 512 U.S. 1220 (1994)). Thus, if a penalty phase instruction "prevents the jury from giving a reasoned moral response to the petitioner's mitigating evidence, or creates the risk that the death penalty would be imposed despite evidence which may call for a life sentence," it violates the Eighth Amendment. *Id.* (citations omitted).

In *Hamilton*, the Ninth Circuit found constitutional error in a lengthy instruction on commutation that was

designed to correct a misleading instruction which was given concurrently. The court found the combination of instructions to be unacceptable because they were confusing and forced the jury to speculate on the likelihood of commutation. *Id.*, 17 F.3d at 1163. Gallego did not argue below that the executive clemency instruction given to the jury at the sentencing phase of his trial misstated the law. Rather, he contended that it was misleading because it failed to adequately and accurately explain how remote the possibility of parole would be in his case. In Nevada, the parole board may not release a prisoner who has his life sentence commuted to include the possibility of parole unless,

> . . . it finds that the prisoner has served at least 20 consecutive years in the state prison, is not under an order that he be detained to answer for a crime or violation of parole or probation in another jurisdiction, and that he has no history of:
>
> (a) Recent misconduct in the institution, and that he has been recommended for parole by the director of the department of prisons;
>
> (b) Repetitive criminal conduct;
>
> (c) Criminal conduct related to the use of alcohol or drugs;
>
> (d) Repetitive sexual deviance, violence or aggression; or
>
> (e) Failure in parole, probation, work release or similar programs.

Nev. Rev. Stat. 213.1099-3 (provision enacted 1981 Nev. Stat. 873).

Although the executive clemency instruction may have failed to explain the intricate limitations on the parole of a prisoner with a commuted sentence, it did not prevent the jury from considering relevant mitigating evidence. Each statement in the instructions accurately stated the law. An instruction which contains all of the factors relevant to clemency and parole runs the risk of unduly focusing the jury's attention on those issues, thereby encouraging jurors to speculate on the likelihood that a defendant's sentence would be commuted. Where a clemency instruction is allowed to inform the jury that a sentence of life without the possibility of parole is subject to executive clemency, brevity is valued. *See generally Hamilton*, 17 F.3d at 1160, 1162, 1163 (repeatedly noting the "two-sentence instruction" approved in *California v. Ramos*, 463 U.S. 992 (1983)).

Hamilton is distinguishable from this case. In that case, the instruction at issue began with the two-sentence clemency instruction approved by the United States Supreme Court in *Ramos*. *Hamilton*, 17 F.3d at 1161-62. However, the instruction went on to partially discuss a

limitation on the commutation power for twice-convicted felons. It also inaccurately suggested that the imposition of any life sentence would cause Hamilton to be eligible for parole in less than 17 years. *Id.* Further, the disapproved instruction cautioned the jury not to speculate on the likelihood that Hamilton would be pardoned or paroled. *Id.* On these facts, the court found that the "jury . . . was diverted from [the task of considering relevant mitigating evidence] by having its attention focused on commutation procedures rather than the significant mitigating evidence defense counsel introduced at the penalty phase." *Id.* at 1163.

Although Penalty Instruction No. 6 did discuss the composition of the Nevada State Board of Pardon Commissioners and that a sentence can be changed only by a majority of the Pardons Board which must include the governor, it did not urge the jury to speculate on the possible votes. The instruction also did not inaccurately suggest that any life sentence would automatically lead to parole eligibility.

In addition to the objectionable content of the instruction, the *Hamilton* court found that "[t]he probability of the jury's improper speculation was compounded by the

prosecutor's inappropriate assertion in closing argument that Hamilton, if sentenced to prison, would be conniving and devising ways to manipulate the system and get out." 17 F.3d at 1162. In closing argument, the prosecution relied on "inflammatory and largely irrelevant letters written by Hamilton" to support its contention. *Id.* The prosecutor in Gallego's trial did not engage in such conduct.

The Ninth Circuit conceded that Instruction No. 6 was "relatively brief and not inaccurate as a general statement of the law." Appendix C at 32. *Gallego*, 124 F.3d at 1076. However, the Ninth Circuit found that it was misleading as applied to the facts of Gallego's case and that it could have prompted (not that it did or that there was a reasonable likelihood that the jury applied the instruction in such a way that prevented consideration of relevant mitigating evidence) the jury into making erroneous speculations about the kind of sentence that Gallego might have to serve. *Id.* at 32.

The Ninth Circuit then reasoned that Gallego sought to make the jury aware of the fact that as a result of his past conduct and his California death sentence, it was not necessary to sentence him to death in order to ensure that

he could not be released after serving only a relatively brief period. *See* Appendix C at 33. The problem with the Ninth Circuit's analysis is that it addresses a question that was not presented to it and which this Court has determined is a new rule for purposes of *Teague v. Lane*, 489 U.S. 288 (1989). *See O'Dell v. Netherland*, ___ U.S. ___, 117 S.Ct. 1969, 1978 (1997). Because *Simmons* constitutes a new rule, it has no application whatsoever to Gallego's conviction which was final in 1986 and certainly has no place in an analysis determining whether Instruction No. 6 violated the Eighth Amendment. Nevertheless, the Ninth Circuit conducted an analysis pursuant to *Simmons v. South Carolina*, 512 U.S. 154 (1994). The use of a *Simmons*-type analysis to determine whether or not the jury instruction contravened *Ramos* is inappropriate. The Ninth Circuit's statement that this case is not contrary to *O'Dell* affords no basis for resting any portion of its determination on a new rule. The Ninth Circuit purported to consider one question and answered another.

The Ninth Circuit simply substituted its judgment for that of the Nevada Supreme Court and the federal district court, inappropriately creating and applying in the process a new rule in contravention of *Teague*. The new

rule that the Ninth Circuit applied is that it is a violation of the Eighth Amendment to present to the jury concededly accurate jury instructions regarding executive clemency which *merely may have* prompted the jury into making erroneous speculations about the kind of sentence a person might actually have to serve *but which did not preclude the defendant from offering any evidence or argument regarding the government's power to commute the sentence.* Indeed, the Ninth Circuit overlooked the fact that Gallego's proposed instruction was, as the state trial judge noted, not the law because that instruction stated unequivocally, "Life imprisonment without the possibility of parole means exactly what it says, that the Defendant shall not be eligible for parole." Gallego argued that his chances for parole were merely remote. While Gallego's chances for parole were remote, they were not non-existent as represented in the instruction offered by Gallego.

The Ninth Circuit's analysis is incorrect and disregards the other considerations in *Ramos* and *Hamilton*. The Ninth Circuit misconstrues *Ramos* and shifts the balance so that there must be an explanation in the instructions of the intricate limitations on the parole of a prisoner with a commuted sentence because those

limitations are necessarily indicative of the "remoteness" of the likelihood of parole. The Ninth Circuit itself has recognized that instructions which explain the intricate limitations on the parole of a prisoner run the risk that they may be so complex that the jury would fail to consider relevant mitigating factors. *Hamilton*, 17 F.3d at 1160. Instruction No. 6 was not so inaccurate or misleading that it was reasonably likely that the jury failed to consider relevant mitigating factors.

The question of the "remoteness" of the possibility of executive clemency is not a *Ramos* issue, rather it is a *Simmons* issue. The accurate statement that clemency was possible is a *Ramos* issue and the Ninth Circuit, as did Gallego, conceded that the instruction was accurate in that regard. The Ninth Circuit ignored this Court's determination in *Ramos* that such an instruction does not diminish the reliability of the sentencing decision. *See Ramos*, 463 U.S. at 998, 1004. Therefore, the Ninth Circuit erred in vacating a death sentence rendered more than a decade ago. The Circuit Court's error should not be left uncorrected because its decision portends other wrong decisions from that court in other Nevada cases which are now undergoing or will undergo habeas review.

CONCLUSION

For the reasons discussed above, the State respectfully requests that this Court grant Cross-Petitioners' conditional cross-petition for certiorari, accept briefing on the merits, and reverse the judgment of the Ninth Circuit Court of Appeals.

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APPENDICES

APPENDIX A

GERALD ARMOND GALLEGO, Appellant, *v.* THE STATE OF NEVADA, Respondent

No. 15932

December 20, 1985 711 P.2d 856

Appeal from judgment of conviction and sentences of death entered upon jury verdicts for two counts of murder in the first degree and from consecutive sentences of life without possibility of parole for two counts of kidnapping in the first degree with substantial bodily harm. Sixth Judicial District Court, Pershing County; Llewellyn A. Young, Judge.

Defendant was convicted of two counts of first degree murder and two counts of first degree kidnapping with substantial bodily harm by jury in the district court and sentenced to death. The Supreme Court held that : (1) denial of change of venue was proper; (2) sufficient evidence independent of accomplice testimony linked him to offenses charged; (3) accomplice testimony was not barred by spousal privilege; (4) evidence of uncharged homicides was properly admitted; and (5) evidence of murders occurring after charged homicides for which defendant had been previously convicted

were properly admitted as aggravating circumstances under death penalty statute.

Affirmed.

Robert Bork, State Public Defender, Carson City, *Fitzsimmons, Lambrose & Perkins*, Carson City, for the Appellant.

Brian McKay, Attorney General, Carson City, and *Richard A. Wagner*, District Attorney, Lovelock, for Respondent.

1. CRIMINAL LAW.

Accused is entitled to be fairly tried based on evidence adduced at trial, and that right remains inviolate in face of apparent guilt, most heinous criminal charges, and less than inspiring station in life.

2. CRIMINAL LAW.

Denial of motion for change of venue for trial of defendant convicted of two counts each of first degree murder and kidnapping was proper, notwithstanding pretrial publicity and rural setting of trial, where victims were not local girls, many residents of area were opposed to trial situs because of expense to county, there were no publications of admissions or confessions attributable to defendant, no jurors were shown to have formed opinion that defendant was guilty, and all

indicated they could follow the law and, if appropriate, return sentences other than death if defendant was found guilty.

3. CRIMINAL LAW.

Sufficient evidence independent of testimony of accomplice existed to link defendant to kidnappings and murders; uncommon variety of macrame rope which matched in all respects rope that bound two victims was found in defendant's car, burial spot for victims was remote site in desert area at spot shown to be familiar to defendant, defendant was seen one day following disappearance of victims relatively near murder site, and evidence of two murders for which defendant had previously been convicted showed common scheme or plan consistent with kidnappings, sexual molestation and eventual killings of instant case.

4. WITNESSES.

Wife is precluded from testifying for or against her husband without his consent under NRS 49.295, subd. 1(a).

5. WITNESSES.

Testimony of woman who was not lawfully married to defendant did not violate spousal privilege, as marriage that defendant sought to validate by means of California nunc pro tunc order was void from beginning as defendant had obtained only interlocutory decree of divorce with respect to earlier

California marriage when "marriage" to accomplice was performed.

6. CRIMINAL LAW.

Introduction of evidence of uncharged homicides for purpose of showing common plan, intent, identity and motive, was proper where uncharged homicides were not remote in time from killings considered, substantial similarities were shown to exist in plan and intent, and probative value of evidence outweighed prejudice to defendant. NRS 48.035, subd. 1.

7. CRIMINAL LAW.

Jury instruction regarding executive clemency which did not inform jury that clemency was available to defendant sentenced to term of life without possibility of parole did not contravene constitutional standards.

8. CRIMINAL LAW.

Jury instructions regarding sentencing for first degree murder as it related to death penalty in which death penalty was removed from sentencing options upon defendant's showing that mitigating circumstances revealed by evidence outweighed aggravating circumstances proved by State, did not unconstitutionally shift burden to defendant to prove that

mitigating circumstances outweighed aggravating circumstances. NRS 175.554, subds. 2, 3.

9. HOMICIDE.

Properly qualified evidence of uncharged homicides allegedly committed by defendant was highly relevant to meaningful consideration of defendant's death worthiness, as evidence of defendant's character, rather than as aggravating circumstances.

10. HOMICIDE.

Evidence of murders for which defendant had previously been convicted was admissible as aggravating circumstances under death penalty statute, NRS 200.033 subd. 2, notwithstanding fact that defendant murdered those two victims after deaths of two victims for whose murders defendant was being sentenced.

OPINION

Per Curiam:

Two young women, Stacey Redican and Karen Twiggs, disappeared from a shopping mall in Sacramento, California, on April 24, 1980. Their brutalized bodies were discovered on July 27, 1980 in shallow graves in remote Limerick Canyon, Nevada. The hands of both girls were trussed with an uncommon variety of macrame rope. An autopsy revealed

that both victims suffered violent deaths caused by multiple blows to the head with a hammer or hammer-like object.

According to the State's primary witness, Charlene Williams (aka Charlene Gallego), defendant had her entice the two victims into a van where they were forcibly confined, sexually molested by Gallego and ultimately transported to the place of their destruction. The gravamen of Charlene's testimony was that Gallego again transmogrified his "sex-slave" fantasy into an intense, morbid reality. During the course of trial, evidence was adduced concerning similar conduct by Gallego in the earlier killing of two young women kidnapped from another shopping mall in the Sacramento area. The latter victims were felled by a number of bullets to the head, whereas Stacey and Karen had been viciously bludgeoned to death by a hammer that Gallego had purchased enroute to the fatal destination in Limerick Canyon.

The jury found Gallego guilty of two counts of murder in the first degree and two counts of kidnapping in the first degree with substantial bodily harm. Gallego was sentenced to death for Stacey and Karen's murder and received two consecutive sentences of life without the possibility of parole for the kidnapping counts. Having determined that no

prejudicial error occurred in Gallego's trial, we affirm the convictions and sentences without exception.

ISSUES ON APPEAL

Gallego raises twenty-one issues on appeal, a number of which we need not consider. Suffice it to say that the trial as a whole produced fairness to the defendant both in the guilt and penalty phases.

I. *The Guilt Phase*

A.

Change of Venue

[Headnote 1]

An accused is entitled to be fairly tried based upon evidence adduced at trial, and that right remains inviolate in the face of apparent guilt, the most heinous criminal charges and a less than inspiring station in life. Irvin v. Dowd, 366 U.S. 717 (1961). Gallego contends that his due process right to fundamental fairness was emasculated beyond redemption by the inflammatory nature of the pretrial news coverage and the rural setting of the trial in Pershing County. Unquestionably, the combination of inflammatory pretrial publicity and a sparse population could produce an ambiance so fraught with prejudice that a fair trial would be unattainable. However, viewed within the context of the

instant case, we have concluded that the confluence of the aforementioned concerns did not deprive Gallego of a fair trial.

It is true, as appellant emphasizes, that the local weekly newspaper of general circulation, the *Lovelock Review-Miner,* published a number of derisive articles about Gallego.[1] The Nevada news media throughout the State provided extensive pretrial coverage of the Gallego prosecution, including its sensational aspects. It may thus be fairly assumed that no geographical area within the State of Nevada having facilities available to accommodate defendant's trial would have been insulated from pre-trial publicity. It is equally clear that a change of venue would have intensified the media coverage accessible to residents of the area of the new trial site. Of paramount concern, then, is whether, in spite of the coverage,

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[1]Indeed, front-page articles referred to Gallego in terms of a sex slayer, convicted killer, accused sex slayer or condemned sex slayer. Telecasts received in the Lovelock area from Reno also made reference to Gallego's "sex-slave fantasy." Several articles in the *Lovelock Review-Miner* focused on the cost of the trial to Pershing County. Other comments related to trial donations made by interested parties from California, *e.g.*, "Here's five bucks to help you on the Gallego trial costs. Hang the bastard!" Reference was also made to California sources who decried California's infirmity in capital cases as opposed to a perceived willingness in Nevada to "do it right."

Gallego was accorded his constitutional right to a fair trial by a panel of qualified, impartial jurors.

Given the realities of our age, it is unlikely that a high-profile criminal defendant will be presented with a venire of uninformed individuals from which to select a jury. Indeed, it is conceded by many jurists that such a panel would least likely provide the considered, enlightened judgment that can best serve the demands of trial. As a result, courts abide by the following standards:

> To hold that the mere existence of any preconceived notion as to the guilt or innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Murphy v. Florida, 421 U.S. 794 (1975), quoting Irvin v. Dowd, *supra* at 723. *See also* Kaplan v. State, 96 Nev. 798, 618 P.2d 354 (1980). In analyzing the constitutional adequacy of Gallego's jury, it should be noted that not all of the circumstances contributing to the pre-trial atmosphere were adverse to Gallego. Importantly, the victims were not local girls. Moreover, it was evident that many residents of Pershing County were opposed to the trial situs because of the

expense to the County. Finally, there were no publications of admissions or confessions attributable to Gallego.

[Headnote 2]

Seven of the jurors were passed for cause by defendant. None of the jurors were shown to have formed the opinion that Gallego was guilty of the crimes with which he had been charged. All of the jurors selected indicated they could follow the law, and, if appropriate, return a sentence other than death if they found Gallego guilty. Gallego nevertheless contends that expressions of impartiality and commitment to decide the guilt or innocence of the defendant solely on the trial evidence were the conditioned responses to the admonitions of the trial judge. We do not agree. Although it is impossible to divine the true mind-set of any prospective juror, we are convinced from the record that the process of jury selection in the instant case yielded a jury panel committed to constitutional

behavior.[2] The trial court did not err in rejecting Gallego's motion for a change of venue.

In reviewing the record, we are likewise convinced that defendant's subsidiary contentions concerning the trial court's rulings in: (1) defendant's challenges for cause; (2) refusing to grant defendant peremptory challenges in excess of the number provided by statute; (3) refusing to exclude the press and public from the voir dire of the venire; and (4) denying defendant's motion to sequester the jury during trial are all without merit. We likewise conclude that the trial judge did not commit error in addressing the venire concerning the duties of a juror.

B.

Testimony of Charlene Williams aka Charlene Gallego

Gallego contends that the lower court erred in permitting Charlene Williams, aka Charlene Gallego, to testify as an accomplice to Gallego's crimes. Prior to Gallego's trial,

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[2]The degree of pre-trial publicity exposure among the jurors varied from superficial to reasonably detailed. Several of the jurors were aware of the defendant's prior homicide convictions in California. In each instance, however, the juror evinced a non-judgmental attitude and an understanding willingness to determine Gallego's guilt or innocence solely upon the evidence adduced at trial.

Charlene had entered a guilty plea to two counts of second degree murder in the deaths of Karen and Stacey and had been sentenced in connection therewith. Charlene testified at trial that she had directly participated in the kidnapping and asportation of the two victims, knowing they would be killed. Under Nevada Law, NRS 175.291,[3] the evidence against Gallego must be analyzed independent of Charlene's testimony in order to ascertain whether sufficient evidence otherwise exists tending to connect Gallego to the commission of the crimes. Defendant argues that no evidence independent of the accomplice testimony exists to link him to the two offenses charged. We disagree.

[Headnote 3]

During the course of the trial, the State produced corroborative evidence that, in cumulative effect, sufficiently

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[3]NRS 175.291 reads as follows:

1. A conviction shall not be had on the testimony of an accomplice unless he is corroborated by other evidence which in itself, and without the aid of the testimony of the accomplice, tends to connect the defendant with the commission of the offense; and the corroboration shall not be sufficient if it merely shows the commission of the offense or the circumstances thereof.

2. An accomplice is hereby defined as one who is liable to prosecution, for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given.

connected Gallego to the two murders. An uncommon variety of macrame rope was found in the trunk of Gallego's Triumph 1500 automobile that matched in all respects the rope that bound the two victims. The State also introduced a photograph taken of Gallego and certain friends several years before the killings at the identical site where the victims were found. The burial place for the two young women was a remote site in a vast desert area, a spot shown to be familiar to Gallego. Additionally, the State proved that the defendant was in Nevada at Lake Tahoe one day following the disappearance of the victims. Finally, evidence of the murders of Kippie Vaught and Rhonda Scheffler showed a common scheme or plan consistent with the kidnappings, sexual molestation and eventual killings in the instant case. The cumulative impact of the aforementioned corroborative evidence was sufficient to tie Gallego to the commission of the homicides without resort to Charlene's testimony. Accordingly, the trial court did not err in its ruling on this issue.

[Headnote 4]

Gallego nevertheless contends that Charlene should not have been allowed to testify in any event because of the spousal privilege. This issue is also without merit. Unlike California, where the spousal privilege belongs to and may be

waived by the witness. People v. Lankford, 127 Cal.Rptr. 408 (C.App.3d 1976), the Nevada evidence code precludes a wife from testifying for or against her husband without his consent. NRS 49.295(1)(a). Therefore, if Charlene and Gallego were lawfully married, her testimony against Gallego would have violated the spousal privilege.

[Headnote 5]

The validity of the marriage Gallego seeks to invoke depends upon the effect of a California nunc pro tunc order entered approximately eighteen years after a 1964 Nevada marriage that was void ab initio under the laws of this State. Gallego contends that the aforesaid order reinstates a 1966 marriage which was otherwise void under Nevada law because the "marriage" was performed in Nevada at a time when only an interlocutory decree of divorce had been obtained with respect to Gallego's earlier California marriage. If Gallego's theory was correct, it would render two subsequent marriages (one of which was never terminated by divorce) void and a third marriage and divorce valid, thereby making his 1978 marriage to Charlene in Reno, Nevada, valid and subsisting at the time of trial. Gallego, who sought and obtained the California nunc pro tunc order in an attempt to successfully invoke the spousal privilege, was never lawfully wedded to

Charlene. NRS 125.290 specifies that all marriages solemnized within this State wherein either of the parties have a husband or wife then living are void. Since the marriage that Gallego sought to validate by means of the nunc pro tunc order was void from the beginning, there was no marriage concerning which the California order could operate to save. Charlene's testimony did not violate the spousal privilege.

C.

Evidence of Uncharged Homicides

At trial, the State was permitted to introduce evidence of the September 11, 1978 Sacramento homicides of Kippie Vaught and Rhonda Scheffler. Purposes for which the evidence was admitted included common plan, intent, identity and motive, all exceptions to the Nevada evidence code prohibiting evidence of prior misconduct in order to show that the defendant acted in conformity therewith.[4] In prosecuting Gallego, the State theorized, as revealed by Charlene's

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[4]NRS 48.045(2) provides:

> Evidence of other crimes, wrongs or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

testimony, that Gallego had been motivated by a sex slave fantasy that he had articulated to Charlene, to kidnap, sexually assault and ultimately murder youthful female targets.

[Headnote 6]

The trial court did not err in permitting evidence of the prior killings to be introduced at trial. The homicides involving Kippie Vaught and Rhonda Scheffler were not remote in time from the killing here considered, substantial similarities were shown to exist in plan and intent, and the probative value of the evidence outweighed prejudice to the defendant. *See* NRS 48.035(1). The lower court so held, and we will not interfere with a discretionary ruling of the district court absent a showing that the ruling was manifestly wrong. *See* Brown v. State, 81 Nev. 397, 404 P.2d 428 (1965). Finally, evidence of the Vaught and Scheffler homicides satisfied the "plain, clear and convincing" standard required for its admissibility. *See* Tucker v. State, 82 Nev. 127, 412 P.2d 970 (1966).

II. *The Penalty Phase*

A.

Executive Clemency

[Headnote 7]

Gallego contends that the jury was given a misleading instruction concerning executive clemency that offends due process. Defendant argues that the instruction "invites speculation," "diminishes the jurors' individual and collective sense of responsibility" and, most important, misleads in not informing the jury that clemency is available to a defendant sentenced to a term of life without the possibility of parole. We do not agree. The identical instruction at issue here was given in Rogers v. State 101 Nev. 457, 705 P.2d 664 (1985), and we there determined that the instruction did not contravene constitutional standards. Constraints applicable to clemency instructions by reason of our holding in Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985), are of prospective effect and thus do not apply here. The trial court did not err on this issue.

B.

Burden of Proof

[Headnote 8]

Gallego argues, as did the defendant in Ybarra v. State, 100 Nev. 167, 679 P.2d 797 (1984), that a jury instruction based upon NRS 200.030(4)[5] unconstitutionally shifts the burden to the defendant to prove that mitigating circumstances outweigh aggravating circumstances. We again conclude that this contention is without merit. Under Nevada's sentencing apparatus, the State is first required to prove one or more aggravating circumstances beyond a reasonable doubt. Thereafter, the defendant may show that the mitigating circumstances revealed by the evidence outweigh the aggravating circumstances proved by the State. Upon such a showing, the death penalty is no longer among the sentencing

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[5]NRS 200.030(4) provides:

Every person convicted of murder of the first degree shall be punished:

(a) By death, only if one or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances.

(b) Otherwise, by imprisonment in the state prison for life with or without the possibility of parole. If the penalty is fixed at life imprisonment with possibility of parole, eligibility for parole begins when a minimum of 10 years has been served.

options. *See* NRS 175.554(2) and (3). As we held in *Ybarra, Supra*, Nevada's statutory sentencing scheme, as it relates to the death penalty, supplies sufficient guarantees against the arbitrary and capricious imposition of the ultimate penalty to pass constitutional scrutiny. The trial court did not commit error in instructing the jury on this subject.

C.

Evidence of Uncharged Homicides

As noted previously, evidence of the prior, uncharged homicides of Kippie Vaught and Rhonda Scheffler was properly admitted during the State's case-in-chief for the limited purposes specified in NRS 48.045. During the penalty phase of Gallego's trial, the district court instructed the jury on the use of the evidence of these two killings as follows:

> You are instructed that with respect to evidence presented during the main trial or guilt phase in this matter, certain evidence was presented concerning the murders of Kippie Vaught and Rhonda Scheffler, which evidence was admitted at that time for limited purposes as previously explained to you.
> You may consider such evidence as bearing upon the defendant's character if you find that the Plaintiff has proved that matter beyond a reasonable doubt. That evidence, however, shall not be considered aggravating circumstance.

Gallego suggests that jury consideration of non-aggravating factors of the nature and severity of these uncharged homicides, attenuates the intendment of Furman v.

Georgia, 408 U.S. 238 (1972), to channel the discretion of the sentencing authority so as to avoid an arbitrary and capricious imposition of the death penalty. Additionally, it is argued that the interjection of such evidence fails to serve the necessary function of narrowing the class of persons against whom the death penalty may be invoked. We reject both contentions. The clearly defined, statutorily required, aggravating circumstances that must be found to exist beyond a reasonable doubt serve to narrow and confine the class of persons against whom the death penalty may apply. Individuals who are identified as potential recipients of the death penalty because of conduct statutorily defined as an aggravating circumstance must then be scrutinized according to their individual characteristics. This process is facilitated by consideration of mitigating circumstances and other reliable factors relevant to the life of the defendant as a whole person. Only then may a sentencing authority render an informed judgment based upon the crime and the defendant who committed it.

If the death penalty option survives the balancing of aggravating and mitigating circumstances, Nevada law permits consideration by the sentencing panel of other evidence relevant to sentence. NRS 175.552. Whether such additional

evidence will be admitted is a determination reposited in the sound discretion of the trial judge.

[Headnote 9]

In the instant case, it is clear that properly qualified evidence of the Vaught and Scheffler murders was highly relevant to meaningful consideration of Gallego's death worthiness. Such evidence not only impacted questions concerning the extent to which Gallego might pose a future threat to society, it also illumined issues concerning the extent to which Gallego's character was suited to assimilating acceptable norms of societal behavior. Contrary to defendant's assertions, evidence of the two uncharged homicides furthered the objective of seeking death penalty evaluation under a process of enlightenment that tends to suppress arbitrariness and caprice as vehicles of decision. The United States Supreme Court, in Barclay v. Florida, 463 U.S. 939 (1983), declared:

> In returning a conviction, the jury must satisfy itself that the necessary elements of the particular crime have been proved beyond a reasonable doubt. In fixing a penalty, however, there is no similar "central issue" from which the jury's attention may be diverted. Once the jury finds that the defendant falls within the legislatively defined category of persons eligible for the death penalty, as did respondent's jury in determining the truth of the alleged special circumstances, the jury then is free to consider a myriad of factors to

> determine whether or not death is the appropriate punishment.

Id. at 950, quoting California v. Ramos, 463 U.S. 992 at 1008 (1983). The trial court committed no error on this issue.

D.

Evidence of Murders Occurring After the Instant Homicides for Which Gallego Had Been Previously Convicted

Gallego objected to the admission of two murder convictions occurring in Contra Costa County Superior Court of California in 1983 as an aggravating circumstance under NRS 200.033(2). Since the two murders involved in the California judgment were committed subsequent to the murders in the instant case, Gallego contends the former killings do not qualify as an aggravating circumstance under the statute.

This issue is one of first impression in the State of Nevada. NRS 200.033(2) provides as follows:

> The only circumstances by which murder of the first degree may be aggravated are:
>
> . . .
>
> 2. The murder was committed by a person who was previously convicted of another murder or of a felony involving the use or threat of violence to the person of another.

Gallego argues that the statute simply provides that a person who is convicted of murder and thereafter commits another murder will have the second offense aggravated by the first. Thus, Gallego concludes that since the June 1983 California convictions did not precede the 1980 killings of Redican and Twiggs, the admission of the former offenses as a statutory aggravating circumstance was error. Gallego is wrong. [Headnote 10]

Aggravating circumstances, as defined by the statute, provide direction to the sentencing authority as it considers an appropriate punishment for the defendant. The statute was never intended to operate on the vagaries of conviction sequences. Instead, the focal point is the time of sentencing. The sentencing panel is entitled to consider all relevant aspects of the defendant's criminal background prior to rendering sentence. The fact that Gallego murdered two victims after killing the two victims in the instant case is not relevant to the dictates of the statute. The clear language of the statute required only that Gallego stood convicted of the California murders at the time of the introduction of that evidence in the penalty phase of the present proceeding. It would be both absurd and counterproductive for this Court to construe the plain language of the statute so as to exclude convictions of

murders or crimes of violence occurring after the primary offense but prior to the penalty phase of a defendant's trial. This we refuse to do. The trial court did not err.

E.

Sentencing Factors

Finally, Gallego contends that his sentence of death was the product of passion, prejudice or arbitrary behavior on the part of the jury. We disagree. Our review of the record reveals that Gallego's sentence was not imposed under the influence of passion, prejudice or any arbitrary factor. Moreover, in conformity with statutory requirements existing at the time of the instant crimes, we have reviewed Gallego's sentence to determine whether it is excessive or disproportionate to the penalty imposed in similar cases in this State, considering both the crime and the defendant. We have concluded that it is not.

We have carefully examined the remaining contentions of error and conclude that they are without merit. Gallego was fairly tried, convicted and sentenced. The judgment of the trial court is therefore affirmed.

Springer, C. J., Mowbray, Gunderson, and Steffen, JJ., and Agosti, D. J.[6]

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[6]The Honorable Deborah A. Agosti, Judge of the Second Judicial District Court, was designated by the Governor to sit in place of The Honorable Cliff Young, who recused himself. Nev. Const., art. 6, § 4.

APPENDIX B

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

GERALD ARMOND GALLEGO, CV-N-93-631-HDM (DEATH PENALTY)

Petitioner,

vs. OPINION

CHARLES WOLFF, et al.,

Respondents.

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Petitioner Gerald Gallego originally presented forty grounds for federal habeas corpus relief. Ground forty was dismissed, but was allowed to be incorporated into grounds twenty-two through thirty-nine. Gallego abandoned grounds thirteen, fifteen, sixteen, seventeen, twenty-three, twenty-six, twenty-seven, twenty-eight, twenty-nine, thirty-one, thirty-two, thirty-five, and thirty-seven. (#36). The court dismissed grounds twenty-two, twenty-four, twenty-five, thirty, thirty-three, thirty-four, thirty-six, thirty-eight, and thirty-nine as procedurally defaulted. The equal protection and due process portions of grounds two and three and the portion of ground eleven alleging that reasonable doubt was improperly defined

have been dismissed as an abuse of the writ.[1] In addition, the court dismissed a portion of ground twenty-one as unexhausted and as failing to state a cognizable ground for relief. (#103). The issues remaining for consideration by the court are grounds one through twelve, fourteen, and eighteen through twenty-one.

I. BACKGROUND.

Gallego was convicted in Lovelock, Nevada, of two counts of first-degree kidnapping in violation of Nev. Rev. Stat. § 200.320-1 and two counts of first-degree murder in violation of Nev. Rev. Stat. § 200.030-1 for the abductions and murders of Stacy Redican and Karen Chipman Twiggs. At trial, evidence was presented that Gallego had also abducted

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[1] Gallego previously filed a petition for habeas relief in this court, CV-N-89-717-HDM. This court granted his motion to dismiss that action without prejudice so that he could return to state court and exhaust those claims by filing a state petition for writ of habeas corpus. (Exhibits 27-29 to #10). This court advised Gallego at that time that he **must** raise any unexhausted claim that he had upon return to state court or face waiver or dismissal of such claims as an abuse of the writ. (#15 in CV-N-89-717-HDM and transcript of hearing held on April 12, 1990, at 8-9). Nevertheless, he failed to present these claims to the Nevada Supreme Court. Consequently, this court found that these portions of these claims constituted an unexcused abuse of the writ. (#117).

and killed Kippi Vaught and Rhonda Scheffler; however, he has never been charged or tried in connection with their deaths. At the penalty stage, evidence was introduced of Gallego's California conviction for the kidnapping and murder of Mary-Beth Sowers and Craig Miller, for which he was sentenced to death. (Ex. 222B to #66 at 1950, 2054). Because evidence of Gallego's conviction and/or involvement in the Vaught/Scheffler and Sowers/Miller murders was introduced during his Nevada trial and are the subject of some of his claims, relevant background about these murders is described below.

In the afternoon of September 11, 1978, Kippi Vaught and Rhonda Scheffler, two teenage girls, left Vaught's Sacramento home to go to a nearby mall where Scheffler intended to exchange a pair of shoes that she had recently purchased. (Ex. 214 to #59 at 1048, 1055). The two girls traveled to the mall in Scheffler's car. (Ex. 214 to #59 at 1048). Vaught was expected home at 3:30 p.m. (Ex. 214 to #59 at 1048). Scheffler was expected to pick up her husband from work at 4:30 p.m. (Ex. 214 to #59 at 1049). When the girls did not appear at their respective homes, their families almost immediately contacted police. (Ex. 214 to #59 at 1049-50). Later that evening, Vaught's mother and sister-in-law

found Scheffler's car parked at the mall where the girls had gone to shop. (Ex. 214 to #59 at 1050). They contacted Scheffler's husband and the police. (Ex. 214 to #59 at 1050; 1055-56). In the trunk of Scheffler's car were found purchases with receipts dated September 11, 1978, which previously had not been in the trunk. (Ex. 214 to #59 at 1050; 1056; 1062). The police were notified of the discovery of the car that evening. (Ex. 214 to #59 at 1050; 1056; 1062).

Two days after the victims disappeared, their bodies were found on farmland in the Slough House area, near Sacramento. (Ex. 214 to #59 at 1062-63). Both had been struck in the head, but had died of gunshot wounds. (Ex. 214 to #59 at 1098-1100; 1102-03). Vaught's hands were tied behind her back with a red woven cord or tie; Scheffler clutched a piece of the same cord or tie. (Ex. 214 to #59 at 1067-68; 1102; 1103). Semen was recovered from the body of Scheffler, which was inconsistent with her husband's blood group, but which was later found to be consistent with Gallego's blood group. (Ex. 215 to #59 at 1101; 1149-57). In addition, fibers and bracken fern, not native to the immediate area, were recovered from the bodies. (Ex. 215 to #59 at 1127). The fibers were subsequently found indistinguishable from carpet fibers from a carpet which had

formerly been inside a van owned by Gallego and a sleeping bag used by him, which were recovered from the home of his wife's parents. (Ex. 215 to #59 at 1127-28; 1131-32; 1138; 1141-49). The bracken fern material was identified as plant material common in the Baxter, California, area. (Ex. 215 to #59 at 1173; 1186-91).

At the time that Vaught and Scheffler disappeared, six witnesses reported to police that they had seen the girls get into a red or maroon car, bearing red, white, and blue out-of-state (Michigan) plates, driven by two black men near the shopping mall. (Ex. 214 to #59 at 1069-71; 1090-91. Ex. 216 to #60 at 1593; 1601-04; 1605-23; 1626-41; 1661-67). One of the witnesses knew and recognized one of the victims. (Ex. 214 to #59 at 1091; Ex. 216 to #59 at 1571-96; 1640). Subsequent to discovery of the bodies, residents living within a few miles of the site where the bodies were found reported seeing a similar style red/maroon sports car carrying two black males and perhaps two white females, bearing red, white, and blue out-of-state plates, on the night the victims disappeared. (Ex. 214 to #59 at 1092; 1093-94. Ex. 216 to #59 at 1641-52; 1668-93). The police later identified a black acquaintance of one of the girls as a possible suspect, but found that his blood group was inconsistent with the semen recovered from

Scheffler's body. (Ex. 215 to #59 at 1149-57). No one was ever charged with the Vaught/Scheffler murders.

Approximately a year and a half later, in the afternoon of April 24, 1980, Karen Twiggs (also referred to as Karen Chipman or Karen Chipman Twiggs) and Stacey Redican, a friend from Reno who was then living at Karen's home, disappeared from Sacramento. The teenage girls had been dropped off by Karen's mother at a nearby mall in North Sacramento at about 2:30 p.m. (Ex. 215 to #59 at 1335; 1340). The girls carried about $70 in cash. (Ex. 215 to #59 at 1335-36). The girls planned to shop, visit a nearby friend and call if they needed a ride home. (Ex. 215 to #59 at 1337). The girls did not return home that evening, but their absence was not reported until the following day. (Ex. 215 to #59 at 1338; 1340).

The bodies of the girls were discovered three months later, on July 27, 1980, in a relatively remote area near Lovelock, Nevada. (Ex. 215 to #59 at 1284). White macrame rope was found near their graves. Karen Twiggs's arms were found tied behind her back with macrame rope. (Ex. 215 to #59 at 1288-89; 1296-97; 1299; 1321-22). Both girls' arms were behind their backs with their jackets zipped closed over their shoulders. (Ex. 215 to #59 at 1322. Ex. 216 to #60 at

1745). Both girls had been bludgeoned to death with a hammer-like instrument. (Ex. 215 to #59 at 1317-20). Due to the elapsed time since death, an autopsy was unable to determine whether either girl had been sexually assaulted. (Ex. 215 to #59 at 1320).

Approximately eight months after the abduction of Redican and Twiggs, in the early morning hours of November 2, 1980, Mary-Beth Sowers and Craig Miller were approached by Gallego in a Sacramento mall parking lot and ordered at gunpoint to get into Gallego's car with Charlene Gallego, nee Williams (hereinafter "Williams"[2]). People v. Gallego, 802 P.2d 169, 175 (Cal. 1990), cert. denied, 502 U.S. 924, 112 S.Ct. 337, 116 L.Ed.2d 277. A friend of Miller recognized Miller and approached the car; Miller swore at the friend and told him to leave. Id. Williams slapped the friend and also told him to leave. Id. The friend, alarmed, noted the license plate number of the car and told another friend who arrived as the car departed. Id. He thereafter notified police. Id. at

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[2] Charlene Gallego, nee Williams, married Gallego in two separate marriage ceremonies in Reno (under the name Gallego and Steven Feil); however, as determined by the trial court, at the time of each ceremony, Gallego was still legally married to other women, voiding his marriages to Williams ab initio.

176. The body of Miller was found barefoot in a field shortly thereafter; he had been shot to death. Id. at 177. The body of Sowers was found three weeks later in a different location, also shot to death. Id. Due to the length of time since death, an autopsy was unable to determine whether Sowers had been sexually assaulted. Id.

Police subsequently identified Williams as the owner of the car from the license plate number. The friend who had last seen the couple subsequently identified Gallego as the man who left with Miller and Sowers. Id. Williams and Gallego were arrested, after fleeing to Nebraska, and returned to California for trial in the murders of Sowers and Miller. Id. at 176.

Williams subsequently approached California authorities with a fabricated story about the night of Miller's and Sowers's abduction. Id. at 177. After a change of counsel, Williams recanted her first story and gave another statement implicating Gallego in several murders in California, Nevada, and Oregon. Id. Williams entered a joint plea agreement with California and Nevada state authorities in which she agreed to testify against Gallego and provide information about the crimes in

return for a prison term of sixteen years and eight months for the murders committed in California and Nevada.[3]

Williams testified against Gallego in California in the Miller/Sowers case. Gallego, who represented himself during the guilt phase, was convicted of two counts of first-degree murder and kidnapping. He was represented by counsel at the penalty phase, and was sentenced to death.

Following trial in California, Gallego was tried for the Redican/Twiggs murders in Lovelock, Nevada, in 1984. Prior to trial, the trial court ruled that the prosecution could present evidence, including the testimony of Williams, which connected Gallego to the Vaught/Scheffler abduction and murders, as tending to show common motive, intent, plan, or scheme.

At the Redican/Twiggs trial, the prosecution presented its case-in-chief in two phases. First, it presented evidence which connected Gallego to the uncharged Vaught/Scheffler abductions and murders. It then presented evidence implicating him in the Redican/Twiggs abductions and

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[3] The terms of Williams's plea agreement are an issue in this case and are discussed in detail below. See Ex. 215 to #59 at 1245-1251 for Williams's plea agreement.

murders. Gallego's putative wife, Charlene Williams, testified against him during both portions of the guilt phase.

During the first phase of the prosecution's case, Williams testified about Gallego's involvement in the uncharged Vaught/Scheffler abduction and murders. Williams testified that on the day that Vaught and Scheffler disappeared, Gallego told Williams that she was going to kidnap a girl for him. (Ex. 215 to #59 at 1220). Williams testified that she and Gallego took their Dodge van to the mall from which Vaught and Scheffler disappeared. (Ex. 215 to #59 at 1220-22). Williams testified that Gallego instructed her to approach two girls at the mall and to "make sure" that she got them into the van. She testified she complied. (Ex. 215 to #59 at 1225). Williams identified the girls as Vaught and Scheffler. (Ex. 215 to #59 at 1225). Williams persuaded the girls to enter the van, after which Gallego got into the van and pulled out a .25 caliber gun. (Ex. 215 to #59 at 1227). Gallego ordered the girls to lie face down and bound the girls' wrists and ankles with white adhesive tape. (Ex. 215 to #59 at 1227). While Williams held the gun on the girls in the back of the van as ordered by Gallego, Gallego drove the van to a frontage road in Baxter, California. (Ex. 215 to #59 at 1228-29). It was late afternoon when they left the mall. (Ex. 215

to #59 at 1230, 1252-53). At Baxter, Gallego parked the van, unbound the girls' ankles, and took them to a clearing. (Ex. 215 to #59 at 1230, 1231). Gallego told Williams to drive the van back to Sacramento and ordered her "to be seen." (Ex. 215 to #59 at 1230). Gallego told her to return to Baxter at midnight with their Oldsmobile Cutlass. (Ex. 215 to #59 at 1231-32). When Williams left the clearing, both girls' ankles had been again bound with tape. (Ex. 215 to #59 at 1231).

Williams started back towards Sacramento at dusk. (Ex. 215 to #59 at 1232). After she arrived back in Sacramento, she visited a friend and exchanged the van for their Oldsmobile in compliance with Gallego's instructions. (Ex. 215 to #59 at 1232). She returned to the Baxter clearing, arriving earlier than instructed. (Ex. 215 to #59 at 1232). Upon signalling, Gallego brought the girls to the car, fully clothed, and placed them in the back seat. (Ex. 215 to #59 at 1232-33). Williams then followed Gallego's instructions and drove the car back to the Slough House area near Sacramento. (Ex. 215 to #59 at 1233). Gallego directed her to pull over beside a farm field, where he took the girls out of the car and told Williams to turn up the radio and not turn around. (Ex. 215 to #59 at 1236). Williams testified that she heard "pops," after which Gallego entered the car, then exited

the car again saying that one of the girls was still wiggling. (Ex. 215 to #59 at 1236). Williams testified that Gallego shot the girls again, then reentered the car and drove the car to the couple's apartment. (Ex. 215 to #59 at 1236). Williams testified that Gallego later said that one of the girls was married and "they would just think she had had sex with her husband." (Ex. 215 to #59 at 1237). Williams also testified that Gallego told her that "he hadn't had sex" with the other girl because she was too fat and that he stated that he had knocked the girls unconscious before shooting them. (Ex. 215 to #59 at 1237, 1240). Williams testified that Gallego subsequently discarded the purse of one of the victims, except for cash found, pounded down the barrel of the gun used to kill the girls, and discarded a tire iron covered with blood. (Ex. 215 to #59 at 1238-39). Williams identified a sleeping bag belonging to the couple and the carpeting from their van, from which samples were found to be consistent with, and indistinguishable from, fibers recovered from the victims' bodies and clothing. (Ex. 215 to #59 at 1240-41).

During the second part of the prosecution's case, Williams testified about Gallego's involvement with the Redican/Twiggs abductions and murders. Williams testified that at the time of the Redican/Twiggs abduction and murders

she worked as a representative for a grocery marketing firm covering various grocery stores in northern California and Nevada and that Gallego worked as a bartender for the Bob-Les Club in Sacramento. (Ex. 215 to #59 at 1414). The evening before Redican and Twiggs disappeared, Williams, Gallego, and another couple had some drinks at the Bob-Les, following softball practice. (Ex. 215 to #59 at 1414). When Gallego became angry, Williams and Gallego left the club. (Ex. 215 to #59 at 1414). The following morning, she was preparing to make a business trip to northern Nevada when Gallego told her that he wanted her to get him a girl. (Ex. 215 to #59 at 1415). Gallego cut several lengths of macrame cord from a spool of such cord kept at their home. (Ex. 215 to #59 at 1417). Gallego told Williams to put the lengths of cord in their van. (Ex. 215 to #59 at 1418).

The couple then departed in the van. Gallego drove while they looked for a girl. (Ex. 215 to #59 at 1418). Gallego stopped at a gas station by Sunrise Mall to call in absent to the Bob-Les, claiming that his mother was sick or had died. (Ex. 215 to #59 at 1418-19). They then drove to the Sunrise Mall, parked the van and entered the mall. (Ex. 215 to #59 at 1419-20).

After some time inside the mall, Gallego pointed out two girls and indicated to Williams that she should approach the pair. (Ex. 215 to #59 at 1421). She approached the girls and persuaded them to come out to the couple's van. (Ex. 215 to #59 at 1421). She learned that one of the girls was named Karen. (Ex. 215 to #59 at 1421). Williams and the girls entered the van after which Gallego opened a side door, took a gun out of a cabinet in the van and pointed it at the girls. (Ex. 215 to #59 at 1422). Gallego told the girls that they were being kidnapped and asked them if they had any money. (Ex. 215 to #59 at 1422-23). Gallego took about $50 from one of the girls. (Ex. 215 to #59 at 1423). Gallego asked the girls whether either of them was worth anything to anybody and that one girl responded that she had friends and family in Reno who could get him anything he wanted. (Ex. 215 to #59 at 1424). Gallego tied the girls up with lengths of the macrame cord Williams had placed in the van. (Ex. 215 to #59 at 1424).

Williams testified that after tying the girls, Gallego drove the four onto I-80 headed towards Reno. (Ex. 215 to #59 at 1425). She drove part of the distance between Sacramento and Reno, during which time Gallego was in the back of the van with the girls. (Ex. 215 to #59 at 1441-42).

She heard Gallego tell the girls to undress, and she saw them do so in the rear view mirror. (Ex. 215 to #59 at 1442). Williams testified that she observed Gallego "having some form of sex" with the girls. (Ex. 215 to #59 at 1443). Before entering Reno, Gallego and the girls had dressed and Gallego took over driving. (Ex. 215 to #59 at 1444).

Gallego stopped at a grocery store in Reno where he purchased a hammer. (Ex. 215 to #59 at 1425-26). One of the girls indicated that she had family living near the store. (Ex. 215 to #59 at 1425-26). After purchasing the hammer, Gallego continued driving to Lovelock, Nevada. (Ex. 215 to #59 at 1427).

After Gallego stopped for food in Lovelock, Williams took over driving, and Gallego directed her to drive to a location in Limerick Canyon, outside Lovelock, where she and Gallego had previously camped with friends. (Ex. 215 to #59 at 1428-29). Williams identified a photograph which showed Gallego, Williams and one of Gallego's co-workers taken at the site some months before. (Ex. 215 to #59 at 1428). Williams testified that while she was driving, Gallego was in the back of the van with the girls. (Ex. 215 to #59 at 1429). At one point, Gallego got angry with her and told her to slow

down, asking her if she was trying to "bounce them off the bed." (Ex. 215 to #59 at 1430).

Williams testified that as they pulled into their former campsite, Gallego again got angry and told her to leave the van and wait by a Coleman lantern he had placed out on a log and not to leave the area. (Ex. 215 to #59 at 1430). At this point it was dark and she could not see inside of the van where Gallego was with the girls. (Ex. 215 to #59 at 1431). Williams testified that Gallego eventually left the van and asked her if she "wanted the girls." (Ex. 215 to #59 at 1431). She said no. (Ex. 215 to #59 at 1431). Williams testified that she observed the girls getting dressed and described their clothing. (Ex. 215 to #59 at 1431-32). Gallego retied the girls' hands behind their backs and they were laid face down in the van. (Ex. 215 to #59 at 1432-33). Williams testified that Gallego then took a green fold-up shovel from the back of the van and a lantern and walked away from the van for about ten minutes. (Ex. 215 to #59 at 1433). Williams was inside the van holding the gun until Gallego returned and took Stacey Redican away from the van. (Ex. 215 to #59 at 1434). He returned again, alone, and took Karen Twiggs, with her hands tied behind her back and her coat around her shoulders, away from the van. (Ex. 215 to #59 at 1434, 1435). Gallego

told Williams to wipe everything clean in the van and then showed her to the girls' gravesites. (Ex. 215 to #59 at 1435).

Williams testified that Gallego put the hammer and the shovel in the van, after cleaning blood off them with paper towels. (Ex. 215 to #59 at 1437). Gallego threw the hammer out of the van as he drove the van out of the canyon. (Ex. 215 to #59 at 1437). Gallego then drove to a campsite near Winnemucca, Nevada, where they spent the night. (Ex. 215 to #59 at 1438).

Williams testified that the following morning she made a business stop at a grocery store in Winnemucca, after which she and Gallego returned to Lovelock for breakfast purchased with money taken from the victims. (Ex. 215 to #59 at 1438). They then traveled to Reno where they purchased clothes, including a shirt for Gallego who had discarded his shirt because it had blood on it. (Ex. 215 to #59 at 1439-40). Williams made reservations at a hotel located at Lake Tahoe, and she and Gallego drove first to Carson City and then on to the hotel at Lake Tahoe. (Ex. 215 to #59 at 1445). Williams and Gallego stayed two nights at Lake Tahoe. (Ex. 215 to #59 at 1445). The first night, Williams and Gallego ran into friends of hers and spent several hours with the couple. (Ex. 215 to #59 at 1446). These friends corroborated

Williams's testimony. The copies of room service and hotel receipts also corroborated this testimony.

Gallego was convicted of two counts of first-degree kidnapping causing substantial bodily harm and two counts of first-degree murder in violation of Nev. Rev. Stat. § 200.320-1 and Nev. Rev. Stat. § 200.030-1, respectively. At the penalty phase, defense counsel presented one witness, Dr. Joan Cartwright. (Ex. 222A to #66). Gallego was sentenced to death for the two counts of murder.

Gallego filed a direct appeal to the Nevada Supreme Court. The supreme court affirmed his conviction and sentence. See Gallego v. State, 101 Nev. 782, 711 P.2d 856 (1985). Gallego subsequently filed an unsuccessful petition for post-conviction relief. Gallego filed a petition for writ of habeas corpus, CV-N-89-717-HDM, which was dismissed so that Gallego could present unexhausted claims to the state courts. Gallego filed a petition for state habeas relief asserting such claims. Gallego thereafter returned to federal court and filed this action.

I. GROUND ONE

Gallego alleges in ground one that:

> [He] was deprived of his constitutional right to a fair and impartial trial by reason of

refusal to move venue from Pershing County, Nevada.

(#36). In additional support of this ground, Gallego has filed the "Affidavit of John Murphy Re: Expansion of the Record viz. Ground One." (#78).

The fourteenth amendment requires that criminal defendants be tried by "a panel of impartial, 'indifferent' jurors." Irvin v. Dowd, 366 U.S. 717, 723 (1961). A trial judge must grant a motion to change venue if prejudicial pretrial publicity made it impossible to seat an impartial jury. See Harris v. Pulley, 885 F.2d 1354, 1360 (9th Cir. 1988). Prejudice caused by pretrial publicity can be either presumed by the saturation and content of the publicity, or it can actually appear on the record in the selection of the jury. Murphy v. Florida, 421 U.S. 794 (1975); see also, Jeffries v. Blodgett, 5 F.3d 1180, 1189 (9th Cir. 1993). Gallego advances arguments alleging both presumed and actual prejudice.

A. PRESUMED PREJUDICE

"Prejudice is presumed when the record demonstrates that the community where the trial was held was saturated with prejudicial and inflammatory media publicity about the crime." Jeffries, 5 F.3d at 1189 (quoting Harris v. Pulley, 885 F.2d 1354, 1361 (9th Cir. 1988)). When reviewing a petition for

habeas corpus, this court must independently examine news reports for volume, content, and timing to assess their potentially prejudicial effect. Id.

Gallego's Nevada trial received extensive media coverage throughout northern Nevada (including Pershing County). It also received substantial coverage in publications distributed in California and nationally. Newspapers from Reno and Lovelock made reference to Gallego's prior convictions and often referred to him as a "sex slayer." See doc. # 78. The newspapers also discussed the prosecution theory that he killed his victims as part of a sex-slave fantasy. Some newspapers also published inflammatory notes from residents of other states who sent donations to Pershing County to fund the prosecution.

But the majority of the news stories were well-balanced, factual accounts of the pretrial events in Pershing County. Direct reference to Gallego's California conviction for the murders of Sowers and Miller were accurate and factual. The news stories did not state or imply an opinion of guilt concerning the Redican/Twiggs murder. The statements made by donors to the prosecution fund clearly appeared as the opinions of individuals. There were no references to confessions or criticisms of defense strategies.

A large part of the coverage involved a balanced debate about whether Gallego should have been tried in Pershing County considering the budget restraints of the county. Notably, the reported facts that were material to Gallego's guilt or innocence were eventually supported by admissible proof at trial.

Gallego relies heavily on a pretrial survey that was conducted on his behalf to gauge bias in Pershing County. The results of the study indicated a very high range of exposure to the case among potential jurors in Pershing County. The trial court was not convinced that the results proved unreasonable bias in the jury pool. This court will not disturb the trial court's implicit factual findings concerning the relevance and accuracy of the results, which are entitled to a presumption of correctness. Cf. Jeffries, 5 F.3d at 1189. The cross-examination of the author of the survey demonstrated that questions concerning bias may have lacked balance because they required potential jurors to base their opinions upon media reports and not courtroom testimony. See generally, Ex. 211 to # 57 (May 8, 1984 hearing) at 41-80.

In discussing this issue, the Nevada Supreme Court concluded,

> [t]he Nevada news media throughout the State provided extensive pre-trial coverage of the Gallego prosecution, including its sensational aspects. It may thus be fairly assumed that no geographical area within the State of Nevada having facilities available to accommodate defendant's trial would have been insulated from pre-trial publicity. It is equally clear that a change of venue would have intensified the media coverage accessible to residents of the area of the new trial site.

Gallego v. State, 101 Nev. 782, 785, 711 P.2d 856, 859 (1985). This court agrees with this conclusion and finds that prejudice should not be presumed from the pretrial media coverage in this case.

B. ACTUAL PREJUDICE

"Actual prejudice exists if the jurors demonstrated actual partiality or hostility that cannot be laid aside." Jeffries, 5 F.3d at 1189. A trial judge's finding on the issue of whether the jury was biased is entitled to a presumption of correctness. Id. (citing Lincoln v. Sunn, 807 F.2d 805, 814-15 (9th Cir. 1987); see also, 28 U.S.C. § 2254 (d).

Gallego contends that jury members were biased in favor of the death penalty and its application in this case. However, "[a] prospective juror may not be excused for her

views concerning capital punishment unless those views would prevent or substantially impair the performance of her duties as a juror in accordance with her instructions and oath." Hendricks v. Vasquez, 974 F.2d 1099, 1103 (9th Cir. 1988).

Initially, upon questioning by Gallego's counsel, some prospective jurors indicated some partiality based upon what they had heard about the case. Once the court explained the legal obligations of jurors, all of the jurors who actually sat for the trial indicated that they would follow the law concerning the requisite burden of proof and consider the full range of punishments depending on aggravating and mitigating factors.

Gallego also contends that he expended peremptory challenges on jurors who should have been excused for cause. This is not a basis for habeas relief. Peremptory challenges are not of constitutional dimension; they are merely statutory rights. Gray v. Mississippi, 481 U.S. 648, 663 (1987); see also Batson v. Kentucky, 476 U.S. 79, 97 (1986).

The record supports the Nevada Supreme Court's finding that "the process of jury selection in the instant case yielded a jury panel committed to constitutional behavior." Gallego v. State, 101 Nev. at 786, 711 P.2d at 859.

II. GROUNDS TWO AND THREE

Gallego alleges in ground two that:

> The evidence was insufficient as a matter of law to require petitioner to stand trial or to support a conviction, in that there was no evidence independent of accomplice testimony legally to link [sic] petitioner to the commission of the charged crimes. Further, the handling of this issue by the Nevada Supreme Court denied petitioner both due process and equal protection of law.

Gallego alleges in ground three that:

> The testimony of Charlene [Williams] was [admitted] in violation of the spousal privilege. Further, the Nevada Supreme Court's handling of this issue relative to this case, in contrast with other cases, denied petitioner both equal protection of law and due process of law.

(#36). This court previously dismissed the portions of these claims which alleged that Gallego was denied equal protection and due process by the Nevada Supreme Court. (# 117). Federal habeas corpus relief is not an applicable remedy unless there is a violation of a federal constitutional right. Engle v. Isaac, 456 U.S. 107, 119 (1982). The remaining portion of grounds two and three do not rise to the level of a constitutional claim; therefore, habeas relief is denied as to the remaining portions of grounds two and three.

III. GROUND FOUR

Gallego alleges in ground four that:

> The trial court abused its discretion and denied petitioner his constitutional right to a fair trial by permitting the state to offer evidence of two uncharged homicides against the petitioner in its case-in-chief.

Gallego contends that the state court erroneously admitted evidence of Gallego's involvement in the uncharged Vaught/Scheffler murders, which Gallego argues was used to show his disposition to abduct teenage girls from shopping malls and to sexually assault and kill them. Gallego also contends that the probative value of this evidence was substantially outweighed by its unfair prejudicial effect. The court disagrees.

Federal habeas relief arising from erroneous state court evidentiary rulings is not available unless such rulings rendered the state proceedings so fundamentally unfair as to violate due process. Bueno v. Hallahan, 988 F.2d 86, 87 (9th Cir. 1993); Jeffries v. Blodgett, 988 F.2d 923, 935 (9th Cir. 1993). "The admission of inculpatory testimony violates due process only 'if there are no permissible inferences the jury may draw from the evidence' and the testimony is 'of such quality as necessarily prevents a fair trial.'" Henry v. Estelle, 993 F.2d

1423, 1427 (9th Cir. 1993) (quoting Jammal v. Van de Kamp, 926 F.2d 918, 920 (9th Cir. 1991)).

This issue was raised on direct appeal, and the Nevada Supreme Court concluded,

> The trial court did not err in permitting evidence of the prior killings to be introduced at trial. The homicides involving Kippie Vaught and Rhonda Scheffler were not remote in time from the killings here considered, substantial similarities were shown to exist in plan and intent, and the probative value of the evidence outweighed prejudice to the defendant.

101 Nev. at 789, 711 P.2d at 861.

The Nevada Supreme Court's conclusion finds ample support in the record. Evidence of Gallego's systematic abduction, sexual assault, and murder of Vaught and Scheffler in 1978 was relevant to show Gallego's plan and intent to abduct, sexually assault, and murder Redican and Twiggs when he told Williams to "get [him] a girl" in 1980. (Ex. 215 to #59 at 1415-16.) The plan and intent in both cases are strikingly similar. The potential prejudice of the evidence is mitigated by the fact that Williams testified at length concerning her own participation in the crimes. Despite Williams's characterization of Gallego as the instigator of the

crimes, acknowledgement of her own participation decreased the inculpatory impact of the testimony and offered the jury a basis upon which it could view her testimony with greater caution.

Thus, this court concludes that the probative value of this testimony outweighed any prejudicial effect on the defendant. The admission of this evidence did not deny Gallego a fair trial.

IV. GROUND FIVE

Gallego alleges in ground five that:

> The [trial] court denied petitioner his constitutional right to a fair trial and to confront and cross-examine witnesses, by refusing to allow testing of the alleged accomplice and evidence of sexually-related conduct by her.

Before trial, Gallego's counsel moved the court for an order that would compel a psychological evaluation of Williams based upon her alleged homosexual conduct while in detention after arrest. The prosecution moved in limine to exclude any mention of such conduct contending the defense lacked proof on the issue and that it was irrelevant. The trial court denied Gallego's motion for a psychological evaluation of Williams and ruled that admissible evidence of specific instances of conduct would only be allowed if Williams opened

the door as to her own veracity or propensity for peacefulness. See Transcript of May 22, 1984 (Ex. 214 to #59 at 996-98).

The trial court did not commit constitutional error by excluding evidence of Williams's propensity toward homosexuality. She was not the defendant on trial. The holdings in McMichael v. State, 94 Nev. 284 (1978), and Finley v. State, 94 Nev. 212 (1978), do not support Gallego's contention that evidence of her sexual orientation should have been admitted. Such evidence was in the nature of character evidence and, therefore, only admissible to rebut any evidence Williams may have offered to show she was a peaceful person or not involved in the murders. Finally, all of the proof offered on those subjects was in the form of prison disciplinary reports which suffered from problems of multiple hearsay and relevance.

Gallego cites Davis v. Alaska, 415 U.S. 308 (1974), and United States v. Lindstrom, 698 F.2d 1154 (11th Cir. 1983), to support his contention that evidence of Williams's sexual orientation and prior domineering conduct should have been admitted. These cases are inapposite. They hold that counsel for an accused should be allowed to develop evidence concerning bias and the witnesses' motivation for testifying. From an evidentiary standpoint, these opinions confirm that

a witness's bias and motive for testifying are always relevant. Here, the only possible relevance of the evidence proffered by Gallego was to prove Williams's propensity for violent homosexual behavior. Gallego fails to identify any authority that gives a defendant a constitutional or statutory right to present evidence of a witness's character in order to prove conformity therewith.

The trial court also acted within its discretion and within constitutional parameters when it declined to order that Williams be subjected to psychological testing. Again, the results of such a test would only be relevant to show Williams's propensity to initiate the crimes. At no time did Williams testify that she was a peaceful individual or incapable of instigating the murders. There was no constitutional error in excluding this testimony or denying the request for psychological evaluation of Williams.

V. GROUND SIX

Gallego alleges in ground six that:

> Petitioner was deprived of [the] effective assistance of counsel, in that trial counsel failed to challenge the contingent, revocable plea bargain of the alleged accomplice as violative of due process of law.

Plea bargains are often contingent upon an agreement that the beneficiary will testify against others. See United

States v. Moody, 778 F.2d 1380, 1385, amended 791 F.2d 707 (9th Cir. 1986). Further, where a plea agreement requires the witness to testify truthfully and completely, the agreement is not so coercive that it violates due process simply because the benefit is contingent upon a witness giving testimony which will support a prosecution. Id.

Gallego concedes that one condition of Williams's plea agreement required her to give "full, fair and accurate testimony" against Gallego at his trial, and Williams was aware of the provision when testifying. This term of the plea agreement sufficiently protected against the possibility of the coercion of Williams. No other provisions of the plea agreement contain coercive language.

Gallego relies predominantly on the Nevada Supreme Court's opinion in Franklin v. State, 94 Nev. 220 (1978), to support his contention that this type of plea agreement violates due process. He argues that the Franklin analysis should be controlling in this case and that this court is precluded from retroactively applying a different rule by Teague v. Lane, 489 U.S. 288, 310 (1989), even though the Franklin opinion has since been overruled.

Gallego reads Teague v. Lane too broadly. Teague limits the retrospective application of "new rules" for the

petitioner's benefit on habeas corpus. Gallego has cited no authority to support the proposition that Teague should be applied somehow to preserve erroneous constitutional case law (since overruled) that would have worked a benefit to Gallego at trial.

Even if this court were to apply Teague, the Ninth Circuit's holding in Moody, supra, is not a "new rule" because it does not break new ground or impose a new obligation on the government. In addition, prior circuit court cases would have compelled the same result. See Teague, 489 U.S. at 301. See also United States v. Nation, 701 F.2d 31, cert. denied, 464 U.S. 856 (1983).

Because Williams's contingent revocable plea bargain did not violate Gallego's due process rights, the failure of counsel to object to the plea bargain did not constitute ineffective assistance of counsel.

VI. GROUND SEVEN

Gallego alleges in ground seven that:

> The [trial] court deprived petitioner of his constitutional right to a fair trial by allowing the state to summarize case-in-chief and hearsay testimony in rebuttal through witnesses.

Gallego argues that he is entitled to habeas relief on this ground in conjunction with grounds four and five. Federal

habeas relief is ordinarily not available for erroneous state court evidentiary rulings unless such rulings render the sate proceedings so fundamentally unfair as to violate due process. See §§ III and IV, infra. Gallego contends that this court must determine whether the three evidentiary errors asserted in grounds four, five, and seven, separately or together, violated his due process rights. He contends that if the claimed erroneous evidentiary rulings are found by this court to constitute nothing more than harmless error individually, this court must determine whether such alleged errors considered together rendered his trial fundamentally unfair. See Cupp v. Naughten, 414 U.S. at 147, 94 S.Ct. at 400-01 (whether an erroneous jury instruction was harmless must be judged in context of the instructions as a whole and the trial record); Suniga v. Bunelle, 998 F.2d 664, 666-67 (9th Cir. 1993) (an erroneous instruction which violates a constitutional norm must be evaluated to determine whether the error was harmless; "structural" errors such as "when a trial court allows the defense to be ambushed with an instruction that changes the theory of the case requires automatic reversal"); United States v. Neuman, 490 F.2d 139, 147 (3d Cir. 1974); Big Pond v. State, 101 Nev. 1, 3, 692 P.2d 1288 (1985).

The court must first evaluate the merits of these claims by determining whether the trial court's rulings were erroneous under state law. The state supreme court has already held that the trial court's rulings were not erroneous under state law. With respect to grounds four and five, this court has concluded that the trial court's rulings were not erroneous under state law. The remaining issue is whether the trial court's admission of challenged rebuttal testimony was erroneous under state law and rendered his trial fundamentally unfair.

Gallego argues that the admission of the rebuttal testimony of California investigator, Ray Biondi, and Nevada investigator, John Compston, both of whom testified during the prosecution's case-in-chief, was erroneous because it permitted the prosecution to improperly summarize its case-in-chief, constituted hearsay, and allowed the prosecution to bolster Williams's credibility when her credibility had not been put in issue by the defense's case-in-chief. During the defense's case-in-chief, witnesses testified that they did not recall whether Gallego was missing from work at the times of the murders or whether he asked others to fill in for him. Other witnesses testified they saw Vaught and Scheffler get into a maroon sports car with out-of-state plates with two black males the afternoon they disappeared. Thus, the defense's

case-in-chief consisted of evidence which supported Gallego's alibi defense and evidence supporting the theory that Scheffler and Vaught were abducted and murdered by someone other than Williams and Gallego. Over defense objections, the trial court permitted the two investigators to testify to certain information withheld from the public in the Vaught/Scheffler and Redican/Twiggs murders and about which Williams had independent knowledge. This was done in an attempt to rehabilitate Williams's credibility. (Ex. 216 to #60 at 1717-26).

Gallego asserts this information did not rebut the defense's contention that Gallego was not involved with the two abductions and murders, but only established that Williams was involved with the two abductions and murders. Gallego argues that this rebuttal evidence was improperly admitted because it did not contradict testimony of defense witnesses, i.e., that Vaught and Scheffler may have been abducted and murdered by two black males or that Gallego had not been working the evening that Redican and Twiggs disappeared.

On rebuttal, the California investigator, Raymond Biondi, testified that the Sacramento Sheriff's Office investigated hundreds of leads, including the witnesses who saw Vaught and Scheffler get into a maroon sports car. Biondi

testified that the Sheriff's Office tested the blood and saliva of a male black acquaintance of Vaught's, who owned the type of maroon sports car identified. Biondi testified that the results were found inconsistent with the semen recovered from Scheffler's body, which resulted in that suspect being eliminated. Biondi also testified to certain allegedly non-public information about which Williams had independent knowledge.

During the prosecution's case-in-chief, defense counsel cross-examined Biondi about whether any information about the Vaught/Scheffler crimes was withheld from the public and whether Williams had independent knowledge of any of this information. At that time, Biondi was not able to identify specifically what facts had not been made public, but was able to do so during rebuttal testimony. Defense counsel then thoroughly questioned Biondi about whether such information had ever been published and established that most of the purportedly non-public information had appeared in newspapers. Thus, although Biondi's testimony concerning the facts withheld from the public should have been elicited on redirect in the prosecution's case-in-chief, the cross-examination of Biondi during rebuttal rendered any error harmless.

Biondi also testified concerning the investigation of one black suspect with whom one of the victims was acquainted. While Biondi's testimony was of limited value to rebut the testimony of several witnesses who stated that Vaught and Scheffler got into a maroon sports car with two black men, the admission of the testimony was not fundamentally unfair. The record contains substantial testimony which independently supports the prosecution theory that Vaught and Scheffler were at the mall well after the time they were allegedly seen by witnesses entering the maroon sports car.

Specifically, the prosecution presented the rebuttal testimony of Larry Sanderson and Joe Stephenson. Sanderson testified that Scheffler attempted to return a pair of shoes at the mall at 2:30 p.m. on the day she disappeared, but that Sanderson refused to provide a cash refund because she did not present the receipt. Sanderson further testified that after he returned from a one-hour break at 5:00 p.m., he found a signed refund slip had been issued to Scheffler in his absence. Joe Stephenson, manager of the shoe store, testified that he had issued the refund to Scheffler between 4:00 and 5:30 p.m. on the date that Scheffler disappeared. The testimony of these witnesses establish that the victims disappeared one to two

hours after the time other witnesses observed the victims getting into the maroon sports car.

Gallego also claims that the rebuttal testimony of Nevada investigator Compston was erroneously admitted and fundamentally unfair. Compston testified that Williams was able to lead officials to the scene of the Redican/Twiggs gravesites and to the location in the mall from which the victims had first been approached and that Williams was able to provide information about the victims, such as that Karen Twiggs had recently been (superficially) shot in the head in Reno and that Redican had family living in Reno. (See generally, Ex. 216 to #60 at 1787-1802). Compston also testified to certain information provided by Williams regarding how the abduction and murders were accomplished, e.g., the victims were bound with white macrame rope purchased by Williams and were bludgeoned with a hammer purchased by Gallego at a Reno supermarket.

Defense counsel asked Compston on cross-examination whether any information about the Redican/Twiggs crimes was withheld from the public and whether Williams had independent knowledge of any of this information. This court concludes that any error in permitting such testimony in rebuttal was harmless because defense counsel thoroughly

questioned Compston about whether the information provided by Williams had ever previously appeared in Sacramento newspapers and established that most of it had.

Gallego argues that Biondi's and Compston's rebuttal testimony "had no relation whatever to the evidence raised in the Petitioner's case-in-chief; in fact, the position here throughout has been that [Williams] was there and acted alone, not that [she] was not there and made up this whole story." While Gallego may choose to characterize the defense case-in-chief as not challenging Williams's credibility, it clearly challenged her credibility about Gallego's presence and participation in the two abductions and murders. The defense challenged Williams's credibility by presenting witnesses whose testimony tended to support a conclusion that someone other than Williams and Gallego abducted Vaught and Scheffler and that Gallego could not have been involved with Williams in the Redican/Twiggs abduction and murders as Williams had testified. If admission of the rebuttal testimony was error, such error was harmless.

VII. GROUND EIGHT

Gallego alleges in ground eight that:

> The trial court violated petitioner's rights to a fair trial and to due process of law by denying motions to continue, thereby

> preventing the production of critical witnesses at trial.

Gallego does not specifically identify any "critical" witness who, but for time limitations prior to and during trial, could have been produced. Gallego makes vague references to mental health experts and/or witnesses who could have been developed by investigating Williams's background. Even at this late date Gallego has failed to identify any "critical witnesses" and what the witness would have testified to at trial. Prior to and during trial in Nevada, defense counsel reviewed information developed by California defense investigators, transcripts of the California penalty phase proceedings, and met frequently with Gallego. In addition, in these proceedings, Gallego has had the opportunity and funds to investigate and develop facts supporting his claims. Gallego has been unable to develop any facts supporting the existence of witnesses who, but for time limitations prior to trial, could have been discovered and produced at trial. The court did not deny Gallego a fair trial by denying the motion for continuance.

VIII. GROUND NINE

Gallego alleges in ground nine that:

> The evidence is insufficient as a matter of law to sustain the petitioner's conviction of

> first degree kidnapping causing substantial bodily harm, thereby depriving him of federal due process of law.

Gallego reformulated this claim somewhat from that stated in his petition that "the trial court violated Petitioner's constitutional freedom from double jeopardy by subjecting Petitioner to enhanced penalties viz. murder and kidnapping in connection with the same act"; however, this court previously concluded that Gallego has presented the substance of this somewhat reformulated claim to the state courts and permitted him to go forward on the claim as presented in his opening brief. (#103).

The original information charged Gallego with two counts of first-degree kidnapping and two counts of murder. Before trial, an amended information was filed which added an allegation of substantial bodily harm resulting from the kidnapping. Gallego objected to instruction 31 which included the element of substantial bodily harm. Defense counsel argued the evidence failed to support a conclusion that the victims experienced substantial bodily harm independent of the acts that caused their deaths, i.e., bludgeoning of the victims. The defense argued that the substantial bodily harm element of the first-degree kidnapping count, therefore, merged into the murder counts. The trial court found that murder required

an element not required by first-degree kidnapping causing substantial bodily harm, i.e., death of the victim. The court further found that evidence had been presented which supported the conclusion that the victims had been raped, or feared rape, that each victim had been struck in the head with a hammer more than one time but did not necessarily die from the first blow, and that each victim experienced fear of imminent death resulting from being bound and transported for several hours in the van. The trial court concluded that this evidence could individually or collectively constitute substantial bodily harm.

At the time of Gallego's trial, Nev. Rev. Stat. § 193.015 provided that:

> As used in Title 16 of NRS, "substantial bodily harm" means:
>
> 1. Bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement or protracted loss or impairment of the function of any bodily member or organ; or
>
> 2. Prolonged physical pain.

(repealed 1985, ch. 82, § 255, p. 326, effective April 6, 1985).

To show that a conviction was obtained upon insufficient evidence in federal habeas proceedings, Gallego

must show that no rational trier of fact could have found guilt beyond a reasonable doubt. Jackson v. Virginia, 443 U.S. 307, 324, 99 S.Ct. 2781, 2791, 61 L.Ed.2d 560 (1979). A rational trier of fact could have found from the evidence presented that the victims did not die as a result of the first hammer blow and that the victims therefore suffered a "[b]odily injury" which created a substantial risk of death. Gallego has not shown that no rational trier of fact could have found that the victims suffered substantial bodily harm as a result of their kidnapping. The jury could conclude from the evidence that each of the girls experienced substantial bodily harm prior to and apart from the act that caused their deaths.

IX. GROUND TEN

Gallego alleges in ground ten that:

> The trial court denied petitioner a fair penalty hearing and due process of law by instructing the jury at the penalty hearing that executive clemency was available to a person sentenced to life without possibility of parole.

At the penalty phase of Gallego's trial, the jury received the following instructions:

Instruction No. 5:

* * *

You are instructed that the sentence of life imprisonment without the

possibility of parole does not exclude executive clemency.

If the punishment is fixed at life imprisonment with the possibility of parole, eligibility for parole begins when a minimum of ten years has been served.

Instruction No. 6:

Executive clemency involves a decision by the State Board of Pardon Commissioners to commute or reduce a defendant's sentence from life without possibility of parole to life with possibility of parole.

Executive clemency may also involve a decision by the State Board of Pardon Commissioners to shorten the time a defendant is eligible for parole.

The State Board of Pardon Commissioners consists of the Governor, the Attorney General, and the five Justices of the Supreme Court of the State of Nevada. The Board can change a sentence only by a majority vote, and only if the Governor is in the majority voting to change the sentence.

(Ex. 222 (B) to doc. #66 at 2036.) At trial, Gallego objected to Penalty Instruction No. 6 on the basis that the law as stated in the instruction could possibly be changed by public referendum. In this petition, he shifts the focus of his

arguments to whether the instruction adequately explained Nevada law on executive clemency.

"In analyzing whether a sentencing phase instruction violates the Eighth Amendment, a court must determine if there is a reasonable likelihood that the jury applied the instruction in such a way that prevented consideration of relevant mitigating evidence." Hamilton v. Vasquez, 17 F.3d 1149, 1160 (9th Cir.), cert. denied sub nom. Calderon v. Hamilton, 114 S. Ct. 2706 (1994) (citing Boyde v. California, 494 U.S. 370, 380 (1990)). Thus, if a penalty phase instruction "prevents the jury from giving a reasoned moral response to the petitioner's mitigating evidence, or creates the risk that the death penalty would be imposed despite evidence which may call for a life sentence," it violates the eighth amendment. Id. (citations omitted). In Hamilton, the Ninth Circuit found constitutional error in a lengthy instruction on commutation that was designed to correct a misleading instruction which was given concurrently. The court found the combination of instructions to be unacceptable because they were confusing and forced the jury to speculate on the likelihood of commutation. Id. at 1163.

Gallego does not argue that the executive clemency instruction given to the jury at the sentencing phase of his trial

misstated the law. Rather, he contends that it was misleading because it failed to adequately and accurately explain how remote the possibility of parole would be in his case. See Petition at 79-80. In Nevada, the parole board may not release a prisoner who has his life sentence commuted to include the possibility of parole unless,

> it finds that the prisoner has served at least 20 consecutive years in the state prison, is not under an order that he be detained to answer for a crime or violation of parole or probation in another jurisdiction, and that he has no history of:
>
> (a) Recent misconduct in the institution, and that he has been recommended for parole by the director of the department of prisons;
>
> (b) Repetitive criminal conduct;
>
> (c) Criminal conduct related to the use of alcohol or drugs;
>
> (d) Repetitive sexual deviance, violence or aggression; or
>
> (e) Failure in parole, probation, work release or similar programs.

Nev. Rev. Stat. § 213.1099-4 (provision enacted 1981 Nev. Stat. 873).

Although the Penalty Instruction No. 6 failed to explain the intricate limitations on the parole of a prisoner with a commuted sentence, it was not so inaccurate or misleading that this court finds it reasonably likely that the jury failed to consider relevant mitigating factors. Each statement in the instructions accurately stated the law. An instruction which contains all of the factors relevant to clemency and parole runs the risk of unduly focusing the jury's attention on those issues, thereby encouraging the jurors to speculate on the likelihood that the defendant's sentence would be commuted. And where a clemency instruction is allowed to inform the jury that a sentence of life without the possibility of parole is subject to executive clemency, brevity is valued. See generally Hamilton, 17 F.3d at 1160, 1162, 1163 (repeatedly noting the "two-sentence instruction" approved in California v. Ramos, 463 U.S. 992 (1983)).

Hamilton is distinguishable from this case. In that case, the instruction at issue began with the two-sentence clemency instruction approved by the United States Supreme Court in Ramos. Hamilton, 17 F.3d at 1161-62. However, the instruction went on to partially discuss a limitation on the

commutation power for twice-convicted felons. It also inaccurately suggested that the imposition of any life sentence would cause Hamilton to be eligible for parole in less than seventeen years. Id. Further, the disapproved instruction cautioned the jury not to speculate on the likelihood that Hamilton would be pardoned or paroled. Id. On these facts, the court found that the "jury . . . was diverted from [the task of considering relevant mitigating evidence] by having its attention focused on commutation procedures rather than the significant mitigating evidence defense counsel introduced at the penalty phase." Id. at 1163.

Although Penalty Instruction No. 6 did discuss the composition of the Nevada State Board of Pardon Commissioners and that a sentence can be changed only by a majority of the Pardons Board which must include the governor, it did not urge the jury to speculate on the possible votes. Neither did the instruction inaccurately suggest that any life sentence would automatically lead to parole eligibility.

In addition to the objectionable content of the instruction, the Hamilton court found that "[t]he probability of the jury's improper speculation was compounded by the prosecutor's inappropriate assertion in closing argument that Hamilton, if sentenced to prison, would be conniving and

devising ways to manipulate the system and get out." 17 F.3d at 1162. In closing argument, the prosecution relied on "inflammatory and largely irrelevant letters written by Hamilton" to support its contention. Id. The prosecutor in Gallego's trial did not engage in such conduct.

The court concludes that the instructions given did not violate Gallego's constitutional rights.

X. GROUND ELEVEN

Gallego alleges in ground eleven that:

> [His] federal constitutional rights were violated by the failure of the penalty jury to find the predicates for death eligibility by the burden of proof mandated by state law, within the context of all of the jury instructions.[4]

In his objection to Penalty Instruction No. 15, Gallego asserts that the death penalty may be imposed by a jury only if it finds beyond a reasonable doubt both that an aggravating circumstance exists and that those circumstances are not outweighed by the mitigating circumstances. See Geary v. State, 110 Nev. 261, 267, 871 P.2d 927, 931 (1994). He argues that the trial court's failure to explain the applicability

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[4] In his opening brief, Gallego also asserts that the jury instruction defining reasonable doubt was improper; however, as discussed above, this court dismissed that portion of ground eleven as constituting an abuse of the writ. See n.1, supra.

of the heightened burden to both the finding of an aggravating circumstance and the weighing of the mitigating circumstances violated due process because the requisite burden is a right created by state statute.

In relevant part, Penalty Instruction No. 15 stated,

> The jury may impose a sentence of death only if it finds beyond a reasonable doubt that there is at least one aggravating circumstance and further finds that the mitigating circumstances do not outweigh the aggravating circumstances.

Ex. 222B (doc. # 66) at 2040. The instruction found acceptable in Geary and Penalty Instruction No. 15 from Gallego's trial are identical. The jury was properly instructed on Nevada law, and no due process violation resulted from the giving of Penalty Instruction No. 15.

XI. GROUND TWELVE

Gallego alleges in ground twelve(1) that:

> The trial court violated petitioner's rights to due process of law and freedom and [sic] against cruel and unusual punishment, in that the court permitted consideration of non-statutory aggravating circumstances at the penalty phase in connection with admission of evidence of two prior uncharged homicides.

Gallego alleges in ground twelve(2) that:

> The aggravating factor of "previous" murder convictions, based upon offenses

occurring after the commission of the murders of which petitioner was convicted in this case, is unconstitutional.

At the time of his trial, Nev. Rev. Stat. § 200.030-4 provided in relevant part that:

> Every person convicted of murder of the first degree shall be punished:
>
> (a) By death, only if one or more aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances.

Nevada Revised Statute Section 200.033 specified that the "only circumstances by which murder of the first degree may be aggravated" are:

> 1. The murder was committed by a person under sentence of imprisonment.
>
> 2. The murder was committed by a person who was previously convicted of another murder or of a felony involving the use or threat of violence to the person of another.
>
> 3. The murder was committed by a person who knowingly created a great risk of death to more than one person by means of a weapon, device or course of action which would normally be hazardous to the lives of more than one person.
>
> 4. The murder was committed while the person was engaged, alone or with others, in the commission of or an attempt to commit or flight after committing or attempting to commit, any robbery, sexual assault, arson in the first

degree, burglary or kidnapping in the first degree, and the person charged:

(a) Killed or attempted to kill the person murdered; or

(b) Knew or had reason to know that life would be taken or lethal force used.

5. The murder was committed for the purpose of avoiding or preventing a lawful arrest or effecting an escape from custody.

6. The murder was committed by a person, for himself or another, for the purpose of receiving money or any other thing of monetary value.

7. The murder was committed upon a peace officer or fireman who was killed while engaged in the performance of his official duty . . . .

8. The murder involved torture, depravity of mind or the mutilation of the victim.

9. The murder was committed upon one or more persons at random and without apparent motive.

Gallego contends that the trial court permitted the jury to consider non-statutory aggravating factors by instructing the jury that they could consider evidence presented during the guilt phase about the Vaught/Scheffler abductions and murders "as bearing upon the Defendant's character, if you find that the Plaintiff [sic] has proved that matter beyond a reasonable doubt. That evidence, however, may not be considered an

aggravating circumstance." (Ex. 222B to #66 at 2039 (Instruction No. 13)).

On direct appeal, the Nevada Supreme Court upheld this instruction as an accurate statement of Nevada law. See 101 Nev. at 790-92. The court stated that although the evidence of the uncharged murders was not a proper aggravating circumstance,

> properly qualified evidence of the Vaught and Scheffler murders was highly relevant to meaningful considerations of Gallego's death worthiness. Such evidence not only impacted questions concerning the extent to which Gallego might pose a future threat to society, it also illumined issues concerning the extent to which Gallego's character was suited to assimilating acceptable norms of societal behavior.

Id. at 791. This court agrees. The evidence was highly relevant to general sentencing considerations. The trial court properly qualified the extent to which this evidence was to be considered by the jury. The limited extent to which that evidence was admitted did not violate Gallego's constitutional rights.

With respect to ground twelve(2), Gallego argues that consideration of his California conviction for the Sowers/Miller

murders as an aggravating factor did not fall within subsection 2 of the statute because, although Gallego was convicted of the Sowers/Miller murders before his conviction in Nevada, the Sowers/Miller murders actually occurred after the Redican/Twiggs murders. The trial court found such a construction to be too restrictive. This court agrees. Nev. Rev. Stat. § 200.033-2 provides that conviction for first-degree murder by a person who has previously been convicted of another murder may be considered in aggravation. Gallego was convicted of the Sowers/Miller murders in California before he was tried for the Redican/Twiggs murders in Nevada. Consideration of the Sowers/Miller murders as an aggravating factor was authorized by statute.

XII. GROUND FOURTEEN

Gallego alleges in ground fourteen that:

> The court denied petitioner's constitutional right to a fair trial and to confront and cross-examine witnesses by refusing to permit accurate evidence concerning the alleged accomplice's sentence to be presented to the jury.

A sixth amendment violation will normally be found only if the jury was "denied sufficient information to appraise the biases and motivations of the witnesses." United States v. Jenkins, 884 F.2d 433, 436 (9th Cir. 1989).

Charlene Williams's plea agreement, in relevant part, provided as follows:

> A. CHARLENE GALLEGO will enter a guilty plea to an offense or offenses in both California and Nevada that will require her to serve a term of imprisonment in either state's prison equivalent to the minimum term for which one convicted of first degree murder without special circumstances would be required to serve in California; that is, two thirds of an indeterminate 25-years-to-life sentence, or 16-2/3 years. Said sentences to run concurrently.
>
> * * *
>
> D. Should the California Board of Prison Terms not ratify the sentence agreement herein specified, it is further agreed that the plea of guilty [for murder in California] shall be deemed involuntary, and be set aside and vacated. If such occurs, the custody of CHARLENE GALLEGO shall be transferred to the State of Nevada where she shall serve a determinate sentence of 16 years and 8 months calculated from November 17, 1980.
>
> E. In the event neither the State of California nor the State of Nevada can limit the actual sentence to be served by CHARLENE GALLEGO to 16 years and 8 months, it is agreed that the plea

> of guilty in both states shall be deemed involuntary and be set aside and vacated, and her right to jury trial reinstated or in CHARLENE GALLEGO's option the right to plead to appropriate, related offenses with determinate sentences to effectuate the actual prison time served of 16 years and 8 months.

(E.g., Ex. 62 to # 54 at 3).

Prior to the Nevada trial, all counsel stipulated that Charlene Williams's plea agreement would not itself be admitted at trial and that only certain aspects of the agreement would be presented to the jury. At trial, defense counsel sought permission to present evidence which showed that under Nevada law at the time, Williams's plea agreement could result in immediate parole, but in any event, substantially less than sixteen and two-thirds years, after deduction of good-time credits, despite the explicit language of the agreement waiving accrual of good-time credits where accrual of such credits would result in Williams serving less than sixteen and two-thirds years in prison. The motion was denied. The Nevada Supreme Court's opinion on direct appeal did not expressly address this issue, but the court found no error on this or any other ground. 101 Nev. at 793.

Gallego contends that the structuring of the plea bargain was illegal because, in Nevada, the judiciary cannot interpose "actual sentences" which would interfere with the executive branch's authority to award good-time credits.

The plea agreement did not contain a provision that required the prison system to allow Williams to waive her good-time credits and serve the full term of imprisonment. Instead, it provided a mechanism to assure that Williams would serve the full sixteen years and eight months term of confinement even if the state parole board did not ratify the use of an actual sentence. If that were to occur in both Nevada and California, Williams had the option of either setting aside her guilty plea and standing trial, or she would plead guilty to additional related crimes so her sentence would be for the time period negotiated under the agreement. Prison officials were not bound by the plea agreement.

This court finds no error in the trial court's decision to accept the plea agreement. The jury was informed of the plea agreement to the degree stipulated by counsel before the trial, and that disclosure included reference to the determinate sentence. The jury was given a fair and accurate description of the plea agreement.

XIII. GROUND EIGHTEEN

Gallego alleges in ground eighteen that:

> Petitioner was unconstitutionally deprived of effective assistance of counsel at trial, by trial counsel's failure to move to exclude all evidence of the prior uncharged homicides involving Kippi Vaught and Rhonda Scheffler on the basis of lost or tainted evidence.

To prove a violation of the sixth amendment's guarantee of effective assistance of counsel, a defendant must demonstrate both that the defense attorney's conduct was professionally unreasonable and that the unreasonable conduct resulted in prejudice. Strickland v. Washington, 466 U.S. 668, 690-92 (1984).

Gallego acknowledges that the failure of the government to preserve vaginal swabs from Scheffler and to test semen stains on Scheffler's underwear do not violate federal due process. Nevertheless, Gallego argues that under Nevada law the failure of counsel to seek suppression of the results of the ABO blood testing of the semen, even without a showing of bad faith, constituted ineffective assistance of counsel. Gallego contends that if counsel had sought and obtained suppression of this evidence, "the corroborative evidence of [Williams's] testimony would be so loose that that would constitute a further reason why the prior uncharged

homicides of [Vaught and Scheffler] should have been excluded," which in conjunction "with everything else in this record, implicates [petitioner's] rights to federal due process." (#36 at 146). Gallego further argues that:

> As of 1984, the Nevada Supreme Court had held that where evidence is lost as a result of inadequate governmental handling, a conviction may be reversed if the defendant can show either bad faith or connivance on the part of the government or prejudice from its loss. Crockett v. State, 95 Nev. 859, 865 603 P.2d 1078 (1979); State v. Havas, 95 Nev. 706, 708-09, 601 P.2d 1197 (1979).

In Havas, the Nevada Supreme Court dismissed charges of forcible rape where the underwear and undergarments of the alleged victim were not preserved and where the garments must have been torn to have been removed in the manner claimed by the victim. 95 Nev. at 707, 601 P.2d at 1198. The court observed that in cases of rape, great reliance is placed on the victim's testimony and "[t]hus, the presence or absence of other evidence which would support or refute the testimony involved has the potential of great significance." The court further stated that:

> On these facts, we believe a rape victim's underpants are so related to the commission of the crime and that their preservation has such potential relevance to the guilt or innocence of an accused that a further showing is unnecessary.

Id. Havas was subsequently overruled by Deere v. State, 100 Nev. 565, 566, 688 P.2d 322, 323 (1984). In Deere, the court limited Havas to its facts stating that:

> When an accused seeks dismissal for the state's good faith loss or destruction of material evidence, he or she must show prejudice flowing from the unavailability of the evidence. To establish prejudice, the accused must make some showing that it could be reasonably anticipated that the evidence sought would be exculpatory.

Id.

The fourteenth amendment does not require that the state preserve potentially exculpatory evidence on behalf of the accused. California v. Trombetta, 467 U.S. 479, 486-87 (1984). Any duty to preserve evidence must meet a constitutional standard of materiality which requires that the evidence possess an exculpatory value that was apparent before the evidence was destroyed, and the evidence must be of such a nature that a defendant would be unable to obtain comparable evidence by reasonably available means. Id., 467 at 488; United States v. Dela Espiella, 781 F.2d 1432, 1437 (9th Cir. 1986). In addition, a petitioner must demonstrate that the police acted in bad faith in failing to preserve potentially useful evidence. Paradis v. Arave, 954 F.2d 1483, 1488 (9th Cir. 1992) vacated on other grounds, _____ U.S. _____, 113 S.Ct.

1837, 123 L.Ed.2d 463. "'The presence or absence of bad faith by the police must necessarily turn on the police's knowledge of the exculpatory value at the time it was lost or destroyed.'" Id. quoting Arizona v. Youngblood, 488 U.S. 51, 57 n.* (1988).

In this case, Gallego has failed to demonstrate any exculpatory value that was apparent in the semen specimens at the time the vaginal swabs and Rhonda Scheffler's underwear were destroyed or lost. Gallego has also failed to identify any evidence of bad faith on the part of the police or prosecution. Gallego was not deprived of effective assistance of counsel. Gallego was not deprived of effective assistance of counsel.

XIV. GROUND NINETEEN

Gallego alleges in ground nineteen that:

> Petitioner was unconstitutionally deprived of [the] effective assistance of counsel at trial, by trial counsel's failure to object to the prosecutor's highly prejudicial closing argument which, under the circumstances of the case, could not be deemed harmless.

In his closing rebuttal argument, the prosecutor made the following statement in response to defense counsel's statement that Charlene Williams's story might have been too horrible to be true:

> This statement, "Charlene's story is too horrible to be true," you want horror? That's horror, and it's true. If it were not, I would walk out of this courtroom right now, but think of the horror that was involved in this case and what she testified to.

(Ex. 222A to #66 at 1893).

The court has previously set forth the effective assistance of counsel standard to be applied in this case. "Because many lawyers refrain from objecting during opening statement and closing argument, absent egregious misstatements, the failure to object during closing argument and opening statement is within the 'wide range' of permissible professional legal conduct." United States v. Necoechea, 986 F.2d 1273, 1281 (9th Cir. 1993) (quoting Strickland, 466 U.S. at 689).

Here, the prosecutor's reference to the truthfulness of Charlene Williams was not so egregious that it rendered defense counsel's failure to object unreasonable. First, it is not clear that the prosecutor's statement was improperly admitted. Defendant's trial counsel invited a response by making repeated references in his closing argument to his personal view of Williams's credibility. E.g. Ex. 222A to #66 at 1882A ("What I'm trying to tell you is, I don't think you

can trust anything she says."). Although vouching by the prosecution is not an appropriate means to rebut such vouching by defense counsel, it does not rise to the level of prejudicial error where it does "no more than respond substantially in order to 'right the scale' . . . ." United States v. Young, 470 U.S. 1, 12-13 (1985). Therefore, defense counsel's failure to object to the statement was not unreasonable and did not constitute ineffective assistance of counsel.

XV. GROUND TWENTY

Gallego alleges in ground twenty that:

> Petitioner's rights to [the] effective assistance of counsel and to due process of law were severely prejudiced by the failure of the trial court to authorize the investigation necessary to conduct a complete background investigation of the alleged accomplice.

Again, under Strickland, Gallego cannot prove a constitutional violation for ineffective assistance of counsel unless he is able to demonstrate that his trial counsel conducted himself in an objectively unreasonable manner, and that there is a reasonable probability that, but for counsel's errors, the result of the proceeding would have been different. 466 U.S. at 687-689 "A particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's

judgments." Id. at 690-91, quoted in Bonin v. Calderon, 59 F.3d 815, 833 (9th Cir. 1995).

There is no allegation in Gallego's brief that his trial counsel either did not attempt to investigate Williams, or that he unreasonably budgeted the resources available to him. Gallego acknowledges "trial counsel was extremely diligent in utilizing the limited time and resources available to him." Gallego has had the time and resources in the course of this proceeding to discover background material on Williams and has not brought any significant evidence to the attention of this court. There is also no allegation that any background investigation of Charlene Williams would have revealed information that might have changed the result at trial. Gallego has failed to support his contention that his counsel's failure to develop additional background evidence on Williams was prejudicial.

Gallego's ineffective assistance of counsel claim is equally unpersuasive as applied to his post-trial attorney. His counsel was given $5000 for investigations relevant to the post-trial proceeding and chose not to devote the funds to an investigation of Williams. He also sought additional funds from the court, but his request was denied. Gallego has failed

to identify any unreasonable conduct on behalf of his post-trial counsel.

Gallego also appears to contend that the court failed to authorize a sufficient investigation of Williams. Again, Gallego has not identified any information that has been uncovered in a subsequent investigation of Charlene Williams, which, if known at the time of the post-trial proceedings, could have changed the results.

XVI. GROUND TWENTY-ONE

Gallego alleges in ground twenty-one that:

> Petitioner was prejudiced by the prosecutor's pecuniary interest in the case; alternatively, the matter should be remanded for further evidentiary hearing as to this ground.

In support of this ground, Gallego submitted an "Affidavit of Counsel Re: Ground 21" (#41) (hereafter "Affidavit"). (#94B). The Affidavit states in relevant part that Gallego obtained various "documents" indicating that the prosecutor had entered into an agreement to collaborate with Charlene Williams and two state investigators, among others, on a book about the murders for which Gallego was convicted after the conclusion of the trial and the filing of the notice of appeal. Attached to the Affidavit are exhibits A through E. Exhibit A is a copy of the complaint filed by Gallego with the

State Bar of Nevada against the district attorney who prosecuted him. The complaint alleges that the prosecutor, along with two police investigators, the Pershing County Sheriff, and Charlene Williams, entered into an agreement to collaborate on a book about the murders at issue and to share royalties therefrom. Exhibit B is a letter from the prosecutor to the Nevada State Bar Counsel responding to Gallego's complaint. Exhibit C is a copy of the agreement entered into by the prosecutor, Charlene Gallego, nee Williams, the investigators, and others, to collaborate on a book about the murders.[5] Exhibit D is the Affidavit of the trial judge outlining the judge's handling of the prosecutor's query regarding the propriety of entering into an agreement to collaborate on the book. Exhibit E is a letter from the State Bar of Nevada stating the State Bar's conclusion that the evidence did not support a finding that the prosecutor had

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[5] Each of the collaborators on the book was to receive five percent of the proceeds, with the exception that Williams was not to "personally" receive her portion, and the remaining ten percent was to benefit the families of the victims. (#36 at 129). Gallego alleges that the net royalties as of May 24, 1989, totaling $5,044.45, were deposited into the prosecutor's trust account. (#36 at 129).

"committed a wilful breach of the Rules of Professional Conduct."

Gallego contends these acts constituted prosecutorial misconduct and violated his right to due process. However, merely establishing that prosecutorial misconduct occurred will not entitle a defendant to federal habeas relief. Gallego must establish how he was prejudiced by such conduct. He must show that his trial was rendered fundamentally unfair by such conduct. Wycoff v. Nix, 869 F.2d 1111, 1113 (8th Cir.), cert. denied, 110 S.Ct. 179, 107 L.Ed.2d 135 (1989); Rose v. Duckworth, 769 F.2d 402, 405 (7th Cir. 1985). See, Branion v. Gramly, 855 F.2d 1256, 1267-68 (7th Cir.), cert. denied, 490 U.S. 1008 (1988). Gallego not only has not established that prosecutorial misconduct occurred, but he has not alleged how he was prejudiced by such conduct.

Gallego contends that if the prosecutor had a pecuniary interest in the outcome of the trial during the trial, then his involvement constituted a conflict of interest, citing Marshall v. Jerrico, Inc., 446 U.S. 238, 249-50 (1980), and Ganger v. Peyton, 379 F.2d 709 (4th Cir. 1967). Both cases are distinguishable. In Marshall, the Supreme Court observed that a prosecutor's direct pecuniary interest in the outcome of a case that impacts the prosecutor's decision to enforce or not

to enforce a certain law may have constitutional ramifications. 446 U.S. at 249-50. But the Court went on to find that the circumstances of that case did not warrant a precise discussion of the limits on a prosecutor who stands to enjoy some pecuniary interest as a result of the prosecution. Id. at 250. Ganger involved a conflict of interest where the prosecutor criminally prosecuted the husband of a former client. In that case there was a direct conflict between the duties of his office as a prosecutor and his former client. Gallego has not alleged or shown in this case that a similar duty ran from the prosecutor to him. Gallego has not alleged or shown that any pecuniary interest which the prosecutor had arose prior to the conclusion of trial or that it prejudiced his defense in any way.

Gallego indirectly argues that the three witnesses who collaborated with the prosecutor on the book contract had a motive to give false testimony or to distort their testimony and that the prosecutor had a motive to knowingly present such testimony.[6] However, Gallego has not established that any of the three witnesses perjured themselves or that the prosecutor knowingly offered perjured testimony. While the

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[6] Gallego acknowledges that the two investigators subsequently verbally repudiated the contract. (#36 at 127).

prosecutor's actions may have been ill advised, Gallego has failed to show that he was prejudiced by this conduct.

Gallego also argues that the prosecutor's collaboration in the book contract while Gallego's direct appeal was pending violated his right to due process and to the effective assistance of counsel on appeal. He contends the book contract involved collaboration with the confessed accomplice and conflicted with the duties owed by the prosecutor to his clients, i.e., the citizens of the State of Nevada. With respect to these assertions, Gallego has not shown that he was prejudiced in his right to a direct appeal or that he has standing to allege ineffective assistance of counsel or conflict of interest against the prosecutor.

Gallego also asserts that the prosecutor's actions compromised the trial judge's impartiality. Gallego has not previously presented the claim that the trial judge was biased to the state courts; thus, such claim is barred. To the extent that Gallego alleges judicial bias, such claim has not been exhausted and is dismissed as an abuse of the writ.

Accordingly, for the reasons set forth in this opinion,

It is hereby ORDERED that the petition of Gerald Armond Gallego for federal habeas relief is denied. The clerk shall enter judgment accordingly.

Dated this 7th day of February, 1996.

UNITED STATES DISTRICT JUDGE

APPENDIX C

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

GERALD ARMOND GALLEGO, *Petitioner-Appellant*, v. E. K. MCDANIEL, Warden, Ely Prison; RON ANGELONE, Director, Nevada Department of Prisons; FRANKIE SUE DEL PAPA, Attorney General of the State of Nevada, *Respondents-Appellees.*	No. 96-99006 D.C. No. CV-N-93-00631-HDM OPINION

Appeals from the United States District Court
for the District of Nevada
Howard D. McKibben, District Judge, Presiding

Argued and Submitted
December 10, 1996-San Francisco, California

Filed September 4, 1997

Before: William C. Canby, Jr., William A. Norris, and
Edward Leavy, Circuit Judges.

Opinion by Judge Leavy

SUMMARY

Criminal Law and Procedure/Capital Cases

The court of appeals affirmed a judgment of the district court in part and reversed in part. The court held that a penalty phase instruction in a capital case that fails to apprise the jury that the defendant's chances of benefitting from executive clemency should he be sentenced to life without parole are remote violates the Eighth Amendment.

In 1978, two teenaged girls disappeared from a Sacramento mall parking lot. Their bodies were found. Both suffered blows to the head, but died from gunshot wounds. One girl's hands were bound. The other had been raped and died clutching a piece of cord similar to that used to bind the other's hands. On April 24, 1980, teenagers Karen Twiggs and Stacey Redican disappeared from a Sacramento mall parking lot. Their bodies were found in Nevada. They died from blows to the head. Twiggs's arms were tied. On November 2, 1980, Mary-Beth Sowers and Craig Miller disappeared from a Sacramento Mall parking lot. Their bodies were discovered. Both died from gunshot wounds.

Charlene Williams and appellant Gerald Gallego were arrested. Williams entered into a plea agreement with authorities in Nevada, California, and Oregon in which

Williams (1) provided information concerning her involvement with Gallego in 10 "sex-slave" murders in those states; (2) promised to testify against Gallego in the California and Nevada prosecutions; (3) pled guilty to two counts of second-degree murder; and (4) was granted transactional immunity for the remaining eight murders.

Gallego was sentenced to death in California for the Sowers/Miller murders. He was brought to trial in Nevada for the Twiggs/Redican murders. He was arraigned on January 12, 1984, and jury selection began on May 14. The trial judge denied motions for a trial continuance and for change of venue.

At trial, Gallego requested that Williams undergo psychological testing to discredit her on cross-examination by introducing evidence of her alleged post-arrest aggressive homosexual conduct while in prison. Gallego argued that such evidence would have buttressed his claim that he did not commit the crimes by implying that Charlene did commit them.

The trial court ruled that such evidence of Williams's character would be admissible only if she opened the door by insisting on her own truthfulness or peacefulness. That did not happen.

In addition to Williams's testimony, there was corroborative evidence: (1) an uncommon variety of macrame rope was found in the trunk of Gallego's car that matched the rope that bound the victims; (2) a photograph of Gallego was taken at the identical site where the victims were found; (3) Gallego was in Nevada at Lake Tahoe the day following the disappearance of the victims; and (4) evidence of the 1978 murders showed a common scheme or plan.

A jury found Gallego guilty on two counts each of first degree kidnaping and first degree murder. During the penalty phase, the jury was instructed as to when the punishment of death could be imposed, that the sentence of life without parole did not exclude executive clemency, and that a sentence of life with parole would make him eligible for parole in a minimum of 10 years (Instruction 5). The jury was also instructed that executive clemency could reduce a defendant's sentence from life without parole to life with parole (Instruction 6). Nevada statutes provide that a reduction of a sentence of life without parole renders a prisoner ineligible for parole until he has served 20 years and that a prisoner whose sentence has been commuted from death to life without parole may not be paroled if under detainer to answer for a crime in another jurisdiction.

Gallego was sentenced to die.

After Gallego was convicted, the prosecutor and Williams agreed to collaborate with a reporter on a book about the trial. The prosecutor received $5000 in royalties.

The Nevada Supreme Court affirmed the conviction and death sentence. After exhausting his state remedies, Gallego filed for federal habeas corpus relief. The district court denied relief. On appeal, Gallego contended that (1) he was denied a fair trial; (2) the jury instructions were improper; (3) he received ineffective assistance of counsel; and (4) there was prosecutorial misconduct.

[1] A trial judge must grant a motion for change of venue if prejudicial pretrial publicity makes it impossible to seat an impartial jury. Prejudice is presumed when the record demonstrates that the community where the trial was held was saturated with prejudicial and inflammatory media publicity about the crime. Actual prejudice is established when the defendant demonstrates that the jurors exhibited actual partiality or hostility that could not be laid aside.

[2] The trial court properly rejected the poll Gallego presented to show bias as being itself biased and unscientific. [3] It is unlikely that a high-profile criminal defendant will be presented with a venire of uninformed individuals from which

to select a jury; indeed such a panel might not serve the demands of trial. It is sufficient if a juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

[4] The victims were not local girls, many county residents were opposed to the trial because of the expense, and there were no publications of admissions or confessions attributable to Gallego. [5] Gallego failed to show the media publicity was so prejudicial and inflammatory as to have constituted legal saturation. There was no presumptive prejudice.

[6] None of the jurors were shown to have formed the opinion that Gallego was guilty and all the jurors selected indicated they could follow the law and, if appropriate, return a sentence other than death. [7] Gallego failed to demonstrate actual prejudice.

[8] Gallego had four months to prepare a defense. he failed to show that he was prejudiced as a result of the denial of a continuance.

[9] The trial court did not commit error by excluding evidence of Williams's propensity toward homosexuality. She was not the defendant on trial. Such evidence was in the nature of character and, therefore, only admissible to rebut any

evidence Williams may have offered to show she was a peaceful person or not involved in the murders. For the same reason, the trial court acted within its discretion when it declined to order that Williams be subjected to psychological testing.

[10] Nevada law mandates that there be sufficient corroborating evidence, independent of any accomplice testimony, to connect the defendant with the commission of the offense charged. [11] The cumulative effective of the corroborating evidence was enough to tie Gallego to the Twiggs/Radican murders, and was sufficient for a rational trier of fact to have found the essential elements of the crimes charged beyond a reasonable doubt.

[12] Gallego contended that because he was already under sentence of death in California, the jury should have been apprised of just how remote his chances were of ever benefitting from the possibility of clemency in Nevada. [13] While Instruction 6 was not inaccurate as a general statement of law, it was misleading as applied to the facts of Gallego's case. It could have prompted the jury into making erroneous speculations about the kind of sentence Gallego might actually have to serve. The combination of the two instructions as given suggested that, were Gallego sentenced to life without

parole, an exercise of clemency in reducing the sentence to life *with* parole would render Gallego eligible for parole in only 10 years. One Nevada statute precluded Gallego's parole before 20 years, and another made it unlikely that he would be paroled at all. [14] The instructions were erroneous.

[15] Gallego claimed that he was denied the effective assistance of counsel because (1) the trial court failed to authorize a background investigation of Williams; (2) defense counsel failed to bring out all of Williams's prior inconsistent statements; (3) defense counsel failed to challenge the terms of Williams's plea agreement; and (4) during the penalty phase of the trial, defense counsel failed to obtain all of Gallego's medical history records.

[16] To show ineffective assistance of counsel, the defendant must show that counsel's representation fell below an objective standard of reasonableness and that there was a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. That Gallego did not do.

[17] Gallego did not show that any pecuniary interest which the prosecutor had in the book deal arose prior to the conclusion of trial or that it prejudiced his defense. [18] He also did not show that he was prejudiced in his right to a direct

appeal or that he had standing to allege either ineffective assistance of counsel or conflict of interest on behalf of the State of Nevada and against the prosecutor.

COUNSEL

Richard F. Cornell, Law Offices of Richard F. Cornell, Reno, Nevada, for the petitioner-appellant.

Robert E. Wieland, Deputy Attorney General, Carson City, Nevada, for the respondent-appellee.

OPINION

LEAVY, Senior Circuit Judge:

Gerald Armond Gallego, a Nevada death row inmate, appeals from the district court's denial of his petition for a writ of habeas corpus, arguing that his state conviction and sentence for murder were unconstitutional due to (1) inappropriate trial venue, (2) improper denials of trial continuance motions, (3) unfair restriction on the scope of cross-examination, (4) insufficient evidence of guilt, (5) unlawful jury instruction, (6) denial of effective assistance of trial counsel, and (7) prejudice resulting from the prosecutor's having a pecuniary interest in the case. For the reasons which follow, we affirm in part, reverse in part and remand for further proceedings.

FACTS AND PRIOR PROCEEDINGS[1]

On the afternoon of September 11, 1978, two teenaged girls, Kippi Vaught and Rhonda Scheffler, disappeared from the parking lot of a Sacramento shopping mall. Their bodies were found two days later in a rural area outside of Sacramento. Although both victims had suffered blows to the head, they died of gunshot wounds. Vaught's hands were tied behind her back. Scheffler, who had apparently been raped, died clutching a piece of cord similar to that used to bind Vaught's hands.

On the afternoon of April 24, 1980, two teenaged girls, Karen Twiggs and Stacey Redican, disappeared from the parking lot of a Sacramento shopping mall. Their bodies were found three months later in a rural area outside of Lovelock, Nevada. Both victims had died from blows to the head. Twiggs' arms were tied behind her back. A piece of rope similar to that used to bind Twiggs' arms was found nearby. The bodies were too decomposed for an autopsy to determine whether either victim had been raped.

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[1]The relevant underlying facts have been adequately summarized elsewhere. *See People v. Gallego*, 802 P.2d 169 (Cal. 1990) and *Gallego v. State*, 711 P.2d 856 (Nev. 1985) (per curiam).

On November 2, 1980, Mary-Beth Sowers and Craig Miller disappeared from the parking lot of a Sacramento shopping mall. Miller's body was found a few hours later in a rural area outside of Sacramento; Sowers' body was found in a different rural area three weeks later. Both victims had died of gunshot wounds. Sowers' body was too decomposed for an autopsy to determine whether she had been raped.

One of Miller's friends had been in the mall parking lot on November 2d and had seen Miller and Sowers leave in a vehicle with Gallego and Gallego's "wife," Charlene Williams.[2] The friend gave the police a description of Gallego, Williams, their vehicle, and its license number. The police eventually tracked Gallego and Williams to Omaha, Nebraska, where the two were arrested and brought back to California to stand trial for the Sowers/Miller murders.

Williams entered into a plea agreement with authorities in California, Nevada, and Oregon. Under the terms of that agreement, Williams (1) provided information concerning her involvement with Gallego in ten "sex slave" murders the pair

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[2]Williams and Gallego were "married" twice in Reno. However, as Gallego was already legally married to other women at both times, his "marriages" to Williams were void *ab initio*.

had committed in those three states; (2) promised to testify against Gallego in the California and Nevada prosecutions; (3) pleaded guilty to two counts of second-degree murder, for which she received a sentence of less than seventeen years' imprisonment; and (4) was granted transactional immunity for the remaining eight murders.

In 1983, Gallego was tried, convicted, and sentenced to death in California for the Sowers/Miller murders. The following year he was brought to trial in Nevada for the Twiggs/Redican murders. During the guilt phase of Gallego's Nevada trial, the prosecution introduced evidence of the then-uncharged Vaught/Scheffler crimes.[3] The jury returned verdicts of guilty on two counts each of first degree kidnapping and first degree murder. During the penalty phase of Gallego's trial, the prosecution introduced evidence of the Sowers/Miller crimes. Gallego was sentenced to die.

The Nevada Supreme Court affirmed Gallego's conviction and death sentence, *Gallego v. State*, 711 P.2d 856 (Nev. 1985). After all of his Nevada state court collateral attacks had failed, including petitions for post-conviction and

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[3]To date, Gallego has still not been charged with the Vaught/Scheffler kidnapping and murders.

habeas corpus relief, Gallego filed the instant petition for a writ of habeas corpus in federal district court. The district court denied relief, and Gallego has timely appealed.

ANALYSIS

Standard of Review

We review *de novo* a district court's decision to grant or deny habeas corpus relief. *Woratzeck v. Stewart*, 97 F.3d 329, 332 (9th Cir. 1996), *cert. denied*, 117 S. Ct. 1443 (1997). We also review *de novo* any underlying state court conclusions of law. *Jeffries v. Wood*, 114 F.3d 1484, 1500 (9th Cir. 1997) (en banc) (citing 28 U.S.C. § 2254(d)(1). While we examine for clear error any factual findings made by the district court in reaching its decision, *Woratzeck*, 97 F.3d at 332, we must defer to state court findings of fact unless "based on an unreasonable determination of the facts in light of the evidence presented[[.]" *Jeffries*, 114 F.3d at 1500 (citations and internal quotations omitted).

Discussion

As a preliminary matter, we must first determine which issues are properly before us on appeal. Gallego originally asserted forty issues in his federal habeas petition, but abandoned thirteen of these issues and voluntarily withdrew one more, subject to its later possible incorporation into

sixteen of the remaining twenty-six issues. The district court then dismissed nine issues on the ground of procedural default, and portions of four others on the grounds of failure to exhaust, failure to state a claim, and abuse the writ. The court finally disposed of the remaining seventeen issues on their merits in an elaborate and carefully reasoned fifty-four page opinion.[4]

The appellees argued below, and continue to insist on appeal, that Gallego waived and/or procedurally defaulted as

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[4]Gallego abandoned issued number 13, 15-17, 23, 26-29, 31, 32, 35 and 37, and voluntarily withdrew issue number 40. The district court dismissed issues number 22, 24, 25, 30, 33, 34, 36, 38, and 39 for procedural default, and dismissed portions of the following issues: Number 21 (failure to exhaust/failure to state a claim); numbers 2 and 3 (failure to exhaust/abuse of the writ); and number 11 (abuse of the writ). The remaining seventeen issues disposed of by the district court were numbers 1-12, 14, and 18-21.

One issue not briefed by either party to the instant appeal is the application *vel non* of the antiterrorism and Effective Death Penalty Act ("Act"), Pub. L. No. 104-132, Title I, 110 Stat. 1214 (Apr. 24, 1996), *amending* 28 U.S.C. §§ 2244 and 2253-55 *and further codified at* 2261-66. At the time of oral argument, it was an open question whether the Act applied to appeals, such as this one, that were pending on April 24, 1996. We have since concluded that the Act does not apply to such petitions. *See Jeffries*, 114 F.3d at 1487, 1499.

to most of those seventeen issues. The appellees contend that the district court should have declined to reach their merits, because those issues either had not been exhausted in the state courts, or had "metamorphosed" in the federal courts from the form in which Gallego had presented them to the Nevada courts.

We reject this contention. The district court carefully and thoroughly dealt with each of these arguments, and properly rejected them on their merits. While our comparison of the issues raised by Gallego in each of his state proceedings with those presented in his federal habeas petition reveals certain differences in wording and presentation, we conclude that the district court correctly determined that the remaining issues in dispute had been fairly presented to the Nevada state courts. This does not fully answer, however, the question of which of Gallego's original forty issues are now before us. In his opening brief, Gallego asserted only eight issues, which he reduced to seven in his reply brief. In their answering brief, the appellees rephrased Gallego's issues and expanded them into a total of thirteen issues. After careful review of the materials provided, we conclude that all of Gallego's issues fall into four broad categories, *viz.*, Fair Trial, Improper Jury Instruction, Ineffective Assistance of

Counsel, and Prosecutorial Misconduct, each of which will be dealt with in turn.

I. FAIR TRIAL

A. *Denial of Motion for Change of Venue*

Arguing that a change of venue was necessary because pervasive "media hype" made it impossible to assemble a panel of impartial local jurors, Gallego contends that the trial court deprived him of his right to a fair trial when it denied his motion for a change of venue. We disagree.

[1] A criminal defendant facing trial by jury is entitled to be tried by "a panel of impartial,'indifferent' jurors." *Irvin v. Dowd*, 366 U.S. 717, 722 (1961). Accordingly, a trial judge must grant a motion for change of venue if prejudicial pretrial publicity makes it impossible to seat an impartial jury. *Harris v. Pulley*, 885 F.2d 1354, 1360 (9th Cir. 1988). As we recently noted,

> A defendant need only demonstrate one of two different types of prejudice in support of a motion to transfer venue: presumed or actual. Prejudice is presumed when the record demonstrates that the community where the trial was held was saturated with prejudicial and inflammatory media publicity about the crime. Prejudice is rarely presumed because "saturation" defines conditions found only in extreme situations. To establish actual prejudice, the defendant must demonstrate that the jurors exhibited actual partiality or hostility that could not be laid aside.

United States v. Sherwood, 98 F.3d 402, 410 (9th Cir. 1996) (as amended) (internal citations and quotations omitted).

1. Presumptive Prejudice

[2] Among the items to which Gallego cites in support of his claim of presumptive prejudice is the defense's "scientifically conducted poll" purporting to show pervasive local bias. From our review of the record, we agree with the district court's conclusion that the trial court properly rejected the poll as being itself biased as well as unscientific.

[3] Gallego also lists some twenty-three examples of how to print and electronic media provided only negative information about him (e.g., a local restaurant's menu offering "Guilty Porker" pork chops and "Death Penalty" liver and onions, and the creation of a local fund to which the public could and did subscribe in order to help defray the community's costs of prosecution).

The Nevada Supreme Court properly noted that,

> Given the realities of our age, it is unlikely that a high-profile criminal defendant will be presented with a venire of uninformed individuals from which to select a jury. Indeed, it is conceded by many jurists that such a panel would least likely provide the considered, enlightened judgment that can best serve the demands of trial. as a result, courts abide by the following standards:

> To hold that the mere existence of any preconceived notion as to the guilt of innocence of an accused, without more, is sufficient to rebut the presumption of a prospective juror's impartiality would be to establish an impossible standard. It is sufficient if the juror can lay aside his impression or opinion and render a verdict based on the evidence presented in court.

Gallego v. State, 711 P.2d at 859 (internal citations omitted).

[4] The Nevada Supreme Court then proceeded to make the following observations with respect to the pretrial publicity surrounding Gallego's trial:

> In analyzing the constitutional adequacy of Gallego's jury, it should be noted that not all of the circumstances contributing to the pre-trial atmosphere were adverse to Gallego. Importantly, the victims were not local girls. Moreover, it was evident that many residents of Pershing County were opposed to the trial situs because of the expense to the County. Finally, there were no publications of admissions or confessions attributable to Gallego.

Id.

The district court's assessment was to the same effect:

> [T]he majority of the news stories were well-balanced, factual accounts of the pretrial events in Pershing County. Direct references to Gallego's California conviction for the murders of Sowers and Miller were accurate and factual.

> The news stories did not state or imply an opinion of guilt concerning the Redican/Twiggs murder (sic). The statements made by donors to the prosecution fund clearly appeared as the opinions of individuals. There were no references to confessions or criticisms of defense strategies. A large part of the coverage involved a balanced debate about whether Gallego should have been tried in Pershing County considering the budget restraints of the county. Notably, the reported facts that were material to Gallego's guilt or innocence were eventually supported by admissible proof at trial.

ER vol. 1, #11 at 16-17.

[5] We conclude from our review of the record that, while there was a considerable amount of media attention devoted to Gallego's trial, Gallego has failed to show that the media publicity in his case was so prejudicial and inflammatory as to have constituted legal saturation. *Cf. Sherwood*, 98 F.3d at 410. Accordingly, we reject the contention of presumptive prejudice.

2. Actual Prejudice

With respect to his claim of actual prejudice, Gallego begins by noting that nearly all of the venire, and most of the jurors empanelled (sic), had some prior knowledge of the case. as we recently stated, however, "a defendant is entitled to an impartial jury, [but] he is not entitled to a jury completely ignorant of the facts. It is not all publicity that causes

prejudice to a defendant, but only that publicity that operates to deprive the defendant of a fair trial." *Sherwood*, 98 F.3d at 410 (internal citations and quotation omitted).

[6] Gallego devotes much of his argument concerning the allegedly biased jury panel to discussing the purported failings of certain perspective jurors. Whatever the truth of these characterizations of the prospective jurors, we are principally concerned here with those who were actually seated on the petit jury.

> Seven of the jurors were passed for cause by defendant. None of the jurors were shown to have formed the opinion that Gallego was guilty of the crimes with which he had been charged. All of the jurors selected indicated they could follow the law, and, if appropriate, return a sentence other than death if they found Gallego guilty.

Gallego v. State, 711 P.2d at 859.

[7] On the strength of this record, we conclude that Gallego has failed to demonstrate the existence of actual prejudice, *i.e.*, he has not shown "that the jurors exhibited actual partiality or hostility that could not be laid aside." *Sherwood*, 98 F.3d at 410 (internal citation and quotation omitted).

B. Denial of Trial Continuance Motion

Gallego contends that the trial court abused its discretion by denying his motion for a continuance of trial, claiming that his counsel lacked sufficient time to prepare an adequate defense. We reject this argument.

[8] Gallego was arraigned on January 12, 1984, and jury selection did not begin in his case until May 14, 1984, giving him four months in which to prepare a defense. There is no contention that Gallego was denied access to the prosecution's files, and we note that the trial court granted additional funding to Gallego for any outside (e.g., investigative) help his counsel might have deemed necessary to the defense. Most importantly, Gallego has failed to show what prejudice he actually suffered as the result of the denial of a continuance. As the district court noted,

> Gallego does not specifically identify any "critical" witness who, but for time limitations prior to and during trial, could have been produced. Gallego makes vague references to mental health experts and/or witnesses who could have been developed by investigating Williams's background. Even at this late date Gallego has failed to identify any "critical witnesses" and what the witness would have testified to at trial. Prior to and during trial in Nevada, defense counsel reviewed information developed by California defense investigators, transcripts of the California penalty phase proceedings, and met frequently with Gallego. In addition, in these proceedings, Gallego has had the opportunity and funds to investigate and develop facts supporting his claims. Gallego

> has been unable to develop any facts supporting the existence of witnesses who, but for time limitations prior to trial, could have been discovered and produced at trial. The court did not deny Gallego a fair trial by denying the motion for continuance.

ER vol. 1, #11 at 31.

In the absence of a showing of actual prejudice to Gallego's defense resulting from the trial court's refusal to grant a continuance, it cannot be said that the district court erred by denying relief on this ground. *Cf. United States v. Bauer*, 84 F.3d 1549, 1562 (9th Cir.) (direct appeal of federal criminal conviction), *cert. denied*, 117 S. Ct. 267 (1996).

C. Restrictions on Cross-Examination

Gallego argues that he was effectively deprived of his Sixth Amendment right to confront his accuser when the trial court denied his request that Charlene Williams be required to submit to psychological testing, and that the results of that testing be made available to Gallego at trial.[5] Gallego's stated

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[5]Gallego argues that the denial of his Sixth Amendment rights applies to both the guilt and penalty phases of his trial. Our review of the record shows that Gallego has raised the penalty phase issue for the first time on appeal. We therefore limit our discussion of this issue to the guilt phase of Gallego's trial. *See Campbell v. Kincheloe*, 829 F.2d 1453, 1455-56 n.1 (9th Cir. 1987) (declining to review issues raised by death penalty petitioner for first time on appeal); *Duckett v. Godinez*, 67 F.3d 734, 746

purpose for the testing was to discredit Williams' testimony on cross-examination by introducing evidence of her alleged post-arrest aggressive homosexual conduct with multiple partners while in prison. Gallego argues that such evidence would have buttressed his claim that he didn't commit the crimes by implying that Charlene, as a highly intelligent lesbian dominatrix, might have been the one who kidnapped and murdered the victims.

[9] The district court summarized its holding in the following language:

> The trial court did not commit constitutional error by excluding evidence of Williams's propensity toward homosexuality. She was not the defendant on trial. * * * Such evidence was in the nature of character evidence and, therefore, only admissible to rebut any evidence Williams may have offered to show she was a peaceful person or not involved in the murders. Finally, all of the proof offered on those subjects was in the form of prison disciplinary reports which suffered from problems of multiple hearsay and relevance.
>
> * * * Here, the only possible relevance of the evidence proffered by Gallego was to prove Williams's propensity for violent homosexual behavior. Gallego fails to identify any authority that gives a defendant a constitutional or statutory right to present evidence of a

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(9th Cir. 1995) (same for issue presented by respondents for first time on appeal), *cert. denied*, 116 S. Ct. 1549 (1996).

> witness's character in order to prove conformity therewith.
>
> The trial court also acted within its discretion and within constitutional parameters when it declined to order that Williams be subjected to psychological testing. Again, the results of such a test would only be relevant to show Williams's propensity to initiate the crimes. At no time did Williams testify that she was a peaceful individual or incapable of instigating the murders. There was no constitutional error in excluding this testimony or denying the request for psychological evaluation of Williams.

ER vol. I, # 11 at 22-23 (internal citations omitted).

The trial court did not forbid Gallego from introducing on cross-examination any evidence of Williams' character in general, or of her alleged propensity for violent homosexual behavior in particular. Rather, the court ruled that such evidence would be admissible only if Williams "opened the door" by insisting on her own truthfulness or peacefulness. This did not happen. Williams did not claim that she had not participated in the crimes charged, and she was subjected to a withering cross-examination that reduced her to tears on at least one occasion. In light of these facts, we conclude that Gallego was not deprived of his constitutional right to confront his accuser.

D. Sufficiency of the Evidence

[10] Citing Nev. Rev. Stat. § 175.291 and *O'Donnell v. Sheriff*, 542 P.2d 733 (Nev. 1975), Gallego argues that Nevada law mandates that there be sufficient corroborating evidence, independent of any accomplice testimony, to connect the defendant with the commission of the offense charged. From this requirement, Gallego contends that he was denied his right to due process and equal protection because the Nevada Supreme Court decided, inconsistent with its prior decisions, that there was sufficient evidence apart from Williams' testimony to link Gallego to the crimes charged.

Gallego apparently never presented the second half of this argument to the Nevada state courts, despite having received an express warning from the district court to do so and having been granted leave to withdraw his initial habeas petition in order to return to the state courts and pursue his unexhausted claims. *See Duncan v. Henry*, 513 U.S. 364, __, 115 S. Ct. 887, 888 (1995) (per curiam) (a federal constitutional issue purportedly arising out of a state law claim is not exhausted when the state courts were only presented with arguments under state law). In the absence of a showing of either cause and prejudice for this failure, or that a "fundamental miscarriage of justice" would result if this issue

were not decided in the first instance by the district court, we decline to reach the merits of this part of his argument.

With respect to the first half of Gallego's argument, we agree with the conclusion of the Nevada Supreme Court that the corroborating evidence was sufficient as a matter of law to link Gallego to the crimes charged.

> An uncommon variety of macrame rope was found in the trunk of Gallego's Triumph 1500 automobile that matched in all respects the rope that bound the two victims. The State also introduced a photograph taken of Gallego and certain friends several years before the killings at the identical site where the victims were found. The burial place for the two young women was a remote site in a vast desert area, a spot shown to be familiar to Gallego. Additionally, the State proved that the defendant was in Nevada at Lake Tahoe one day following the disappearance of the victims. Finally, evidence of the murders of Kippie [sic] Vaught and Rhonda Scheffler showed a common scheme or plan consistent with the kidnapping, sexual molestation and eventual killings in the instant case.

Gallego v. State, 711 P.2d at 860.

[11] The cumulative effect of this corroborative evidence, viewed int he light most favorable to the prosecution, was enough to tie Gallego to the Twiggs/Redican murders, and was sufficient for a rational trier of fact to have found the essential elements of the crimes charged beyond a

reasonable doubt. *See Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

II. IMPROPER JURY INSTRUCTIONS

Gallego argues that he was denied his Eighth Amendment right to a fair hearing at the penalty phase of his trial because the jury was instructed that executive clemency might be available to Gallego if the jury decided to sentence him to life without the possibility of parole instead of death. Under the facts of this case, we must agree with this contention.

The two jury instructions of which Gallego complains (Jury Instructions 5 and 6) are quoted in full below:

> The punishment of death may be imposed only if one or more aggravating circumstances are found and any mitigating circumstances or circumstances which are found do not outweigh the aggravating circumstance or circumstances.
>
> Otherwise, the punishment shall be imprisonment in the state prison for life with or without the possibility of parole.
>
> You are instructed that the sentence of life imprisonment without the possibility of parole does not exclude executive clemency.
>
> If the punishment is fixed at life imprisonment with the possibility of parole, eligibility for parole begins when a minimum of ten years has been served.

ER vol. II-A, # 30 at 5 (Jury Instruction Number 5).

> Executive clemency involves a decision by the State Board of Pardon Commissioners to commute or reduce a defendant's sentence from life without possibility of parole to life with possibility of parole.
>
> Executive clemency may also involve a decision by the State Board of Pardon Commissioners to shorten the time a defendant is eligible for parole.
>
> The State Board of Pardon Commissioners consists of the Governor, the Attorney General, and the five Justices of the Supreme Court of the State of Nevada. The Board can change a sentence only by a majority vote, and only if the Governor is in the majority voting to change the sentence.

ER vol. II-A, #30 at 6 (Jury Instruction Number 6).

Gallego objected to the second of these instructions (viz., Jury Instruction 6), and asked the court to give the following instruction instead:

> Regarding the possible punishments, you are instructed as follows:
>
> 1. Life imprisonment with the possibility of parole is a sentence to life imprisonment which provides that the defendant would be eligible for parole after a period of ten years. This does not mean that he would be paroled after ten years, but only that he would be eligible after that period of time.
>
> 2. Life imprisonment without the possibility of parole means exactly what it says, that the Defendant shall not be eligible for parole.
>
> 3. If you sentence the Defendant to death, you must assume that the sentence will be carried out.

ER vol. II-A, # 31 at 3 (Defendant's Instruction C). The trial court refused to give Gallego's proposed instruction "because [it is] not the law." *Id.*

[12] Gallego argues that his proposed instruction should have been given in lieu of Jury Instruction 6, not because Instruction 6 incorrectly states the law, but because it inadequately states the law as applied to the facts of his particular case. Simply put, Gallego contends that, because he was already under the sentence of death in California, the jury should have been apprised of just how remote his chances were of ever benefiting from the possibility of executive clemency in Nevada. *See* Nev. Rev. Stat. §213.1099-4 (". . . the board may not release on parole a prisoner whose sentence to death or to life without possibility of parole has been commuted to a lesser penalty unless it finds that the prisoner . . . is not under an order to be detained to answer for a crime . . . in another jurisdiction[.]").

The parties agree that this issue is governed by *California v. Ramos*, 463 U.S. 992 (1983) and by *Hamilton v. Vasquez*, 17 F.3d 1149 (9th Cir. 1994) (as amended). In *Ramos*, the Supreme Court upheld the constitutionality of the so-called "Briggs Instruction" concerning the possibility of executive clemency as a factor for a jury to take into

consideration during a capital trial's penalty phase proceedings.[6]

The Briggs Instruction reads as follows:

> You are instructed that under the State Constitution a Governor is empowered to grant a reprieve, pardon, or commutation of a sentence following conviction of a crime.
>
> Under this power a Governor may in the future commute or modify a sentence of life imprisonment without possibility of parole to a lesser sentence that would include the possibility of parole.

Ramos, 463 U.S. at 995-96.

The Supreme Court noted that the power of commutation was constitutionally relevant because it was part of the jury's permissible consideration of future dangerousness under *Jurek v. Texas*, 428 U.S. 262 (1976). *Ramos*, 463 U.S. at 1001-1002. The Court went on to hold, however, that there was no "diminution in the reliability of the sentencing decision of the kind condemned in *Gardner v. Florida*, 430 U.S. 349 (1977)." 463 U.S. at 1004.

In *Gardner*, the jury had been given access to a presentence report that the defense had not seen. The death

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[6]The Briggs Instruction "was incorporated into the California Penal Code as a result of a 1978 voter initiative popularly known as the Briggs Initiative." *Ramos*, 463 U.S. at 995 n.4.

sentence was overturned "[b]ecause of the potential that the sentencer might have rested its decision in part on erroneous or inaccurate information that the defendant had no opportunity to explain or deny[.]" *Ramos*, 463 U.S. at 1004. The Court in *Ramos* went on to note that

> *Gardner* provides no support for respondent. The Briggs Instruction gives the jury accurate information of which both the defendant and his counsel are aware, and it does not preclude the defendant from offering any evidence or argument regarding the Governor's power to commute a life sentence.

Id. (footnote omitted).

Thus, one of the key factors emphasized by the Court in *Ramos* was that of *accuracy*:

> Finally, we emphasize that informing the jury of the Governor's power to commute a sentence of life without possibility of parole was merely an accurate statement of a potential sentencing alternative. To describe the sentence as "life imprisonment *without possibility* of parole" is simply inaccurate when, under state law, the Governor possesses authority to commute that sentence to a lesser sentence that includes the possibility of parole. The Briggs Instruction thus corrects a misconception and supplies the jury with accurate information for its deliberation in selecting an appropriate sentence.

Id. at 1009 (emphasis in original; footnote omitted). *Accord Caldwell v. Mississippi*, 472 U.S. 320, 342 (1985) (during the penalty phase of a capital case, jurors may be instructed on

post-sentencing review by appellate courts, so long as the information provided the jurors is accurate) (O'Connor, J., concurring in part and concurring in judgment).

The question of accuracy figured largely in *Hamilton*, where we construed *Ramos* as requiring the reversal of the district court's denial of habeas relief based on a challenged penalty phase jury instruction in a capital case. We discussed the Eighth Amendment's application to such an instruction in the following terms:

> In analyzing whether a sentencing phase instruction violates the Eighth Amendment, a court must determine if there is a reasonable likelihood that the jury applied the instruction in such a way that prevented consideration of relevant mitigating evidence. A penalty phase instruction violates the Eighth Amendment if it prevents the jury from giving a reasoned moral response to the petitioner's mitigating evidence, or creates the risk that the death penalty would be imposed despite evidence which may call for a life sentence.

Hamilton, 17 F.3d at 1160 (internal citations omitted). We proceeded to hold that a lengthy and detailed instruction consisting of thirty-seven dense lines of explanation and admonition, "cobbled together" into a "confusing pastiche" and given in addition to and in explanation of a Briggs Instruction, was misleading to the jury and therefore constituted an inaccurate statement of the law under *Ramos*. *Id.* at 1161-64.

[13] While Instruction 6 was relatively brief and not inaccurate as a general statement of the law, it was misleading as applied to the facts of Gallego's case. It could have prompted the jury into making erroneous speculations about the kind of sentence Gallego might actually have to serve. The combination of the two instructions as given suggests that, were Gallego sentenced to life without the possibility of parole, an exercise of clemency by the Board of Pardon Commissioners in reducing the sentence to life *with* parole would render Gallego eligible for parole in only ten years, if not less. That is not the law. One Nevada statute would preclude Gallego's parole before twenty years, and another would make it unlikely that he would be paroled at all. *See* Nev. Rev. Stat. § 213.1099-4 (reduction of sentence of life without possibility of parole renders prisoner ineligible for parole until he has served at least twenty years); Nev. Rev. Stat. § 213.1099-4 (prisoner whose sentence has been commuted from death or life imprisonment without parole may not be paroled if under detainer to answer for crime in another jurisdiction).

The Supreme Court's most recent pronouncement on this subject, *O'Dell v. Netherland*, __U.S. __, 1997 WL 331797 (U.S. June 19, 1997) (No. 96-6867), is not to the

contrary. In that case, the Court held that the rule announced by the plurality in *Simmons v. South Carolina*, 512 U.S. 154 (1994) (viz., that a capital defendant must be permitted to inform his sentencing jury that he is parole-ineligible if the prosecution argues that the defendant presents a future danger), was a new rule of purposes of *Teague v. Lane*, 489 U.S. 288 (1989). *O'Dell*, __U.S. at __, 1997 WL 331797, *2.

Here, by way of contrast, Gallego only sought to make the jury aware of the fact that, as the result of his past conduct and his California death sentence, it was not necessary to sentence him to death in Nevada in order to ensure that he could not be released after serving only a relatively brief period. *See Ramos*, 463 U.S. at 1004 ("The Briggs Instruction gives the jury *accurate* information of which both the defendant and his counsel are aware, *and it does not preclude the defendant from offering any evidence or argument regarding the Governor's power to commute a life sentence.*") (emphasis added). That position is consistent with the principle announced in *Ramos* and explained in *Hamilton*.

[14] Accordingly, we conclude that the instructions as given inadequately stated the law as applied to the facts of

Gallego's case, and find that the district court erred by ruling to the contrary.[7]

III. INEFFECTIVE ASSISTANCE OF COUNSEL

[15] Gallego claims that he was denied the effective assistance of counsel during the guilt phase of his trial because (1) the trial court failed to authorize a background investigation of Williams; (2) defense counsel failed to bring out all of Williams' prior inconsistent statements; and (3) defense counsel failed to challenge the terms of Williams' plea agreement. Gallego also claims that he was denied the effective assistance of counsel during the penalty phase of his trial because (4) defense counsel failed to obtain all of Gallego's medical history records.

[16] In order to show that he was denied the effective assistance of counsel, "(1) the defendant must show that counsel's representation fell below an objective standard of reasonableness; and (2) the defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."

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[7]Because *Ramos* antedates the finality of Gallego's case, there is no "new rule" issue for purposes of *Teague*.

United States v. McMullen, 98 F.3d 1155, 1157 (9th Cir. 1996) (citation and internal quotations omitted), *cert. denied*, __ U.S. __, 1997 WL 251244 (U.S. June 9, 1997). This Gallego has not done.

1. Incomplete Background Investigation

The district court summarized its findings with respect to Gallego's first argument concerning the failure to conduct a proper background investigation as follows:

> There is no allegation in Gallego's brief that his trial counsel either did not attempt to investigate Williams, or that he unreasonably budgeted the resources available to him. Gallego acknowledges "trial counsel was extremely diligent in utilizing the limited time and resources available to him." Gallego has had the time and resources in the course of this proceeding to discover background material on Williams and has not brought any significant evidence to the attention of this court. There is also no allegation that any background investigation of Charlene Williams would have revealed information that might have changed the result at trial. Gallego has failed to support his contention that his counsel's failure to develop additional background evidence on Williams was prejudicial.
>
> Gallego's ineffective assistance of counsel claim is equally unpersuasive as applied to his post-trial attorney. His counsel was given $5,000 for investigations relevant to the post-trial proceeding and chose not to devote the funds to an investigation of Williams. He also sought additional funds from the court, but his request was denied. Gallego has failed to identify any unreasonable conduct on behalf of his post-trial counsel.

> Gallego also appears to contend that the court failed to authorize a sufficient investigation of Williams. Again, Gallego has not identified any information that has been uncovered in a subsequent investigation of Charlene Williams, which, if known at the time of the post-trial proceedings, could have changed the results.

ER vol. I, # 11 at 49-50. We agree with this assessment, and conclude that the district court did not err by ruling as it did.

2. Prior Inconsistent Statements

Gallego's second argument, which appears to be an amalgam of several issues, suffers from two defects. First, Gallego himself freely admits that his trial counsel made a tactical decision not to keep Williams on the witness stand for two or three days in the hopes of bringing out every single inconsistent statement she'd ever made, for fear that it would only serve to emphasize the damning portions of her testimony. Second, this claim of error involves issues that were either abandoned or were properly found by the district court to have been procedurally barred from federal habeas review by an adequate and independent ground of state law. Accordingly, we find no error with the district court's ruling on this issue, either.

3. Williams' Plea Agreement

Gallego's third argument is really a combination of two issues: First, that his counsel was ineffective by failing to

persuade the trial court to inform the jury that Williams might get good time credits in prison and serve less than the amount of time called for in her plea agreement; and second, that his attorney was ineffective by failing to challenge Williams' plea agreement on the ground that it was a contingent, revocable plea bargain violative of due process.

With respect to the first contention, the jury was informed about the existence of a plea bargain between Williams and the prosecution, including the crimes to which she had pleaded guilty and the approximate amount of time she would serve. While the specifics of the plea agreement were not admitted into evidence at trial (all counsel having stipulated that the agreement itself would not be admitted at trial), it cannot be said that the district court erred by concluding that the jury was not denied "sufficient information to appraise the biases and motivations" of the witnesses. *United States v. Marbella*, 73 F.3d 1508, 1513 (9th Cir.) (quoting *United States v. McClintock*, 748 F.2d 1278, 1290 (9th Cir. 1984), *cert. denied*, 116 S. Ct. 2555 (1996).

As for Gallego's second argument, the mere fact that the terms of Williams' plea bargain were contingent upon her agreement to testify against Gallego does not rise to the level of a due process violation. She was required to testify fully

and truthfully, and Gallego was permitted to impeach her credibility on the ground that the plea bargain might have encouraged her to lie. *See United States v. Moody*, 778 F.2d 1380, 1385 (9th Cir. 1985), *as amended*, 791 F.2d 707 (1986).

4. Gallego's Medical History Records

Gallego's fourth argument is that defense counsel had been ineffective at the trial's penalty phase by failing to discover and bring to the jury's attention all of Gallego's medical records which showed a history of mental illness. Gallego argues that his lawyer had been rendered ineffective by not having been given sufficient time and/or adequate resources to develop this line of attack, which would have buttresses the testimony of Dr. Joan Cartwright, Gallego's sole penalty phase witness. The district court found that Gallego had failed to present this issue to the state courts in his first post-conviction proceedings, and concluded that Gallego had not demonstrated cause and prejudice to overcome this procedural default. Gallego counters by arguing that appointed counsel in his first round of state post-conviction proceedings was also ineffective by failing to bring this line of inquiry to the state courts.

We agree with the district court's determination that this issue was not fairly presented to the state courts until

Gallego's second round of state post-conviction proceedings. Moreover, even if we were inclined to reject the findings of the Nevada state courts that the failure of Gallego's appointed post-conviction counsel to timely assert this issue (i.e., in the first round of his state post-conviction proceedings) did not constitute ineffective assistance on his part, such a determination would not constitute "cause" for Gallego's failure to timely assert the issue, *Bonin v. Vasquez*, 999 F.2d 425, 429-30 (9th Cir. 1993) (per curiam order), nor could it be used to "bootstrap" a finding of ineffectiveness on the part of Gallego's trial counsel for conduct occurring during the trial's penalty phase. *Id.; see also Jeffers v. Lewis*, 68 F.3d 299, 300 (9th Cir. 1995) (en banc) (plurality opinion). Finally, on the strength of his record, we conclude that no "fundamental miscarriage of justice" will result by holding as we do. *See Id.* at 300 (quoting *McCleskey v. Zant*, 499 U.S. 467, 494-95 (1991).

IV. PROSECUTORIAL MISCONDUCT

According to Gallego, the prosecutor in his Nevada case was approached by a Sacramento journalist after the jury had convicted Gallego and sentenced him to death. A contract was entered into that eventually included the prosecutor, two of the investigators involved in the case, and Williams, all of

whom agreed to collaborate on a book to be written about the events leading up to and including the trial. The prosecutor received approximately $5,000 in royalties from the book. Williams could not, and did not, receive any royalties from the book, the investigators later repudiated the contract. Citing such cases as *Marshall v. Jerrico, Inc.*, 446 U.S. 238 (1980) and *Ganger v. Peyton*, 379 F.2d 709 (4th Cir. 1967), Gallego contends that the prosecutor's pecuniary interest in the case constituted misconduct warranting reversal of Gallego's conviction. We disagree.

[17] In *Marshall*, the Supreme Court observed that a prosecutor's direct pecuniary interest in the outcome of a case that has an impact on the prosecutor's decision whether or not to enforce a particular statute may have constitutional ramifications. 446 U.S. at 249-50. Gallego has neither alleged nor shown that any pecuniary interest which the prosecutor had arose prior to the conclusion of the trial or that it prejudiced Gallego's defense in any way. Similarly, *Ganger* involved a conflict of interest where the prosecutor criminally prosecuted the husband of a client in civil (i.e., divorce) proceedings. In that case there was a direct conflict between the duties of his office as a prosecutor and those owed to his client. 379 F.2d at 714. Gallego has neither alleged nor

shown in this case that any similar duties ran from the prosecutor to him.

More to the point, Gallego must allege and show resultant prejudice; *i.e.*, he must demonstrate that his trial was rendered fundamentally unfair by the conduct of which he complains. *See Wycoff v. Nix*, 869 F.2d 1111, 1113 (8th Cir. 1989); *Rosae v. Duckworth*, 769 F.2d 402, 405 (7th Cir. 1985). Gallego has neither alleged nor shown that he was prejudiced by such conduct.

Gallego makes several related arguments, equally meritless. Gallego contends that the three witnesses who collaborated with the prosecutor on the book contract had a motive to give false testimony or to distort their testimony and that the prosecutor had a motive to knowingly present such testimony. However, Gallego has not established that any of the three witnesses perjured themselves or that the prosecutor knowingly offered perjured testimony.

[18] Gallego also argues that the prosecutor's collaboration on the book during the pendency of Gallego's direct appeal violates his rights to due process and to the effective assistance of counsel on appeal. He contends the book contract involved collaboration with the confessed

accomplice and conflicted with the duties owed by the prosecutor to his clients, *i.e.*, the citizens of the State of Nevada. With respect to these assertions, Gallego has not shown that he was prejudiced in his right to a direct appeal or that he has standing to allege either ineffective assistance of counsel or conflict of interest on behalf of the State of Nevada and against the prosecutor.

Finally, Gallego asserts that the prosecutor's actions compromised the trial judge's impartiality. Gallego has not previously presented this claim to the state court, and has shown no cause or prejudice justifying this failure. Accordingly, we will not review this claim. To the extent that Gallego alleges judicial bias, such claim has not been exhausted and is dismissed as an abuse of the writ.

In light of the above, we conclude that the district court did not err by rejecting the claims of prosecutorial misconduct.

CONCLUSION

In light of the erroneous jury instructions given during the penalty phase of Gallego's trial, we **REVERSE** that portion of the district court's decision and **REMAND** with instructions that the district court issue the writ unless, within a time set by the district court, the State of Nevada proceeds to resentence Gallego.

AFFIRMED in part, **REVERSED** in part, and **REMANDED** with instructions.

APPENDIX D

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GERALD ARMOND GALLEGO, Petitioner-Appellant, v. E. K. MCDANIEL, Warden, Ely State Prison; RON ANGELONE, Director, Nevada Department of Prisons; FRANKIE SUE DEL PAPA, Attorney General of the State of Nevada, Respondents-Appellees.	Nos. 96-99006 D.C. No. CV-N-93-00631-HDM ORDER

Before: CANBY and LEAVY, Circuit Judges.

The panel has voted to deny the petition for rehearing and has recommended rejecting the suggestion for rehearing en banc.

The full court has been advised of the en banc suggestion and no judge of the court has requested a vote on it.

The petition for rehearing is DENIED and the suggestion for rehearing en banc is REJECTED.

APPENDIX E

> 3. The board may not release on parole a prisoner whose sentence to death or to life without possibility of parole has been commuted to a lesser penalty unless it finds that the prisoner has served at least 20 consecutive years in the state prison, is not under an order that he be detained to answer for a crime or violation of parole or probation in another jurisdiction, and that he has no history of:
>
> (a) Recent misconduct in the institution, and that he has been recommended for parole by the director of the department of prisons;
>
> (b) Repetitive criminal conduct;
>
> (c) Criminal conduct related to the use of alcohol or drugs;
>
> (d) Repetitive sexual deviance, violence or aggression; or
>
> (e) Failure in parole, probation, work release or similar programs.

Nev. Rev. Stat. 213.1099-3 (provision enacted 1981 Nev. Stat. 873).

Supreme Court, U.S.
FILED
MAY 5 1998
CLERK

NO. 97-1632

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1997

E.K. McDANIEL, Warden, Ely State Prison; ROBERT BAYER, Director, Nevada Department of Prisons; FRANKIE SUE DEL PAPA, Attorney General of the State of Nevada

Cross-Petitioners,

v.

GERALD ARMOND GALLEGO,

Cross-Respondent,

BRIEF OF CROSS-RESPONDENT IN OPPOSITION TO THE CONDITIONAL CROSS-PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Per 21 U.S.C. § 848q(9)

EDITOR'S NOTE

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I. QUESTIONS PRESENTED FOR REVIEW

1. Were the Conditional Cross-petitioner's questions presented for review adequately preserved to the Court below?

2. Can a reviewing federal court ever be required to conduct a "harmless error" analysis upon finding that an executive clemency instruction to a Nevada jury, which is a "deathworthy" issue, is erroneous?

3. If the answer to question "2" is in the affirmative, is the error herein not harmless due to the constitutional error *viz.* jury selection?

4. Does an executive clemency instruction which is misleading, in terms of the lack of probability either of executive clemency or of release on parole at the time of the capital petitioner's trial, violate the Eighth Amendment?

II. OPINIONS AND JUDGMENTS BELOW

This is accurately set forth in the Conditional Cross-petition, as well as in Gerald Armond Gallego's Petition in Case No. 97-8160.

III. JURISDICTIONAL STATEMENT/CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

In addition to the authority set forth by the Conditional Cross-petitioners, Nevada Revised Statutes, Sections 200.030, 200.033, 200.035 and 175.552

IV. STATEMENT OF THE CASE

Cross-petitioners' recitation of the Statement of the Case in their Conditional Cross-Petition is accurate.

V. REASONS FOR DENYING THE WRIT

A. INTRODUCTION:

1. A COMPARISON OF HOW CONDITIONAL CROSS-PETITIONERS RAISE THE QUESTIONS PRESENTED FOR REVIEW AGAINST HOW THEY PRESENTED THE ISSUES TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Ultimately, the Conditional Cross-petition for Writ of *Certiorari* is without merit, and can easily be denied on that basis, as the Court shall see. Preliminarily, however, the Court should understand that procedurally, *certiorari* cannot providently be granted as to the main question presented for review, because it was not raised in anything close to the format as raised herein to the court below.

Gallego was the appellant in the court below, and as the Court can ascertain from the published opinion at 124 F.3d 1065, a number of issues were raised. The Conditional Cross-petitioners discussed the "executive clemency" issue to the Ninth Circuit at pages 84-89 of the answering brief of the Appellees, a true and correct copy of

which is attached hereto as Ex. "A." The "executive clemency" issue was presented as "Ground 10" in Gallego's 28 U.S.C. § 2254 Petition to the United States District Court for the District of Nevada. As it appears therefrom, the attorney general's argument was that Hamilton v. Vasquez, 17 F.3d 1149,1161-64 (9th Cir.), cert. denied *sub nom*, 512 U.S. 1220 (1994) was distinguishable, on the basis that the defective "executive clemency" instruction there was more misleading than the one at bar; and the one at bar was not inaccurate, and therefore, not unconstitutional. (Ex. "A," pp. 87-88) Nevada's attorney general also argued that Gallego had "deliberately misinterpreted" NRS 213.1099(4) in order to set up his argument. (Ex. "A," p. 89) In other words, the attorney general's position to the court below was not that the "executive clemency" instruction given in Gallego's case constituted "harmless error" which had to be analyzed per Brecht v. Abrahamson, 507 U.S. 619 (1993). Nowhere are the words "harmless error" found in the attorney general's argument therein. It is true that the attorney general made a general "harmless error" argument at page 124 of their brief. (See: Ex. "B") However that was a generic statement at the end of their brief, whereby it would be impossible for the Ninth Circuit to determine what alleged errors (guilt or penalty phase) the attorney general was referencing, and why Brecht would be applicable at all to any sentencing or penalty phase issues.

Likewise, nowhere in the Conditional Cross-petitioner's brief to the court below, did the attorney general argue that resolution of the "executive clemency" issue necessarily implicated Simmons v.

South Carolina, 512 U.S. 154 (1994), and that Simmons constituted a "new rule" for purposes of Teague v. Lane, 489 U.S. 288 (1989). However in fairness, the court below did pass on that issue, even though not raised in the brief. See: Gallego, 124 F.3d at 1076.

It is fundamental that this Court does not consider issues not raised or inadequately preserved in the briefs to the court below, unless the court below raised them. See: Hoover v. Ronwin, 466 U.S. 558, 574, n. 25, 104 S.Ct. 1989, 1998 n. 25, 80 L.Ed 2d 590 (1984), rehearing denied, 476 U.S. 1268 (1984); United States v. Ortiz, 422 U.S. 891, 899, 95 S.Ct. 2585, 2589, 45 L.Ed. 2d 623 (1975); Auer v. Robbins, ___U.S.___, 117 S.Ct. 1735, 1738-41, 118 L.Ed. 2d 352 (1997); Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 697-98, 104 S.Ct. 2694, 2699, 81 L.Ed. 2d 580 (1984).

Based thereon, it would seem relatively clear that this Court should not even consider Conditional Cross-petitioner's first and main issue presented, because not only was it inadequately raised (at best) to the court below, but the court below – quite understandably – did not even consider it at Gallego, 124 F.3d at 1074-76. Simply put, assuming *arguendo* that there is some viability to the proposition that a federal appellate court can do a "harmless error" review of a "deathworthy" issue, how can one blame the Ninth Circuit for not engaging in such a "harmless error analysis" when they were not specifically asked to do so relative to this issue?!

Petitioners' second question would suffer from the same problem, insofar as their Simmons issue is concerned. However, the Ninth Circuit did them the favor of raising the issue for them, and

accordingly, that issue can ultimately be reviewed. For reasons stated below, however, it is utterly devoid of merit.

2. A BRIEF OVERVIEW OF NEVADA'S STATUTORY DEATH PENALTY SCHEME

In order to understand why Conditional Cross-petitioners' issues are without merit, it is necessary to understand the Nevada statutory scheme *viz.* the imposition of the death penalty.

In Nevada, a person convicted of first degree murder is punished either by death, by imprisonment for life without the possibility of parole, or by imprisonment for life with the possibility of parole, with eligibility for parole beginning when a minimum of 20 years has been served.[1] NRS 200.030(4) (Ex. "C") The death penalty can lawfully be imposed by statute only if one or more aggravating circumstances are found and any mitigating circumstances which are found do not outweigh the aggravating circumstance or circumstances. NRS 200.030(4)(a). NRS 200.033 (Ex. "D") lists the statutorily defined "aggravating circumstances," while NRS 200.035 (Ex. "E") lists six specific mitigating circumstances, plus a "catch-all" category of "any other mitigating circumstance." However, the defendant is not required to establish any mitigating circumstances in order to avoid being sentenced to death (Wesley v. State, 112 Nev. 503, 916 P.2d 793, 803, cert. denied, 137 L.Ed. 2d 346 (1996)), and a Nevada jury is never required to impose the death penalty, even if the aggravating circumstances established outweigh the mitigating established (or lack thereof). See: Bennett v. State, 106 Nev. 135, 144, 787 P.2d

[1]At the time of Gallego's trial, however, the possibility of parole eligibility was when a minimum of 10 years had been served.

797, 803, cert. denied, 498 U.S. 925 (1990)).

"Executive clemency" is nowhere mentioned in NRS 200.033 or 200.035. However, NRS 175.552(3) (Ex. "F") provides that, at a penalty hearing, evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, defendant or victim **and on any other matter which the court deems relevant to the sentence**, whether or not the evidence is ordinarily admissible. Thus, pursuant to that statute, evidence regarding "executive clemency" is admissible during the penalty phase of a Nevada capital murder trial. Petrocelli v. State, 101 Nev. 46, 55, 692 P.2d 503, 510 (1985).

Thus, as the Nevada Supreme Court explained in Canape v. State, 109 Nev. 864, 859 P.2d 1023 (1993), cert. denied, 115 S.Ct. 176 (1994), the court considers aggravating and mitigating circumstances in determining whether a capital defendant is **death-eligible**. See: Canape, 109 Nev. at 877-83, 859 P.2d at 1031-35. However, the "weighing" that goes on with a Nevada capital jury is only with respect to the death-eligibility process; matters such as character evidence *viz.* non-charged offenses and executive clemency instructions are matters of **deathworthiness**. See: Canape, 109 Nev. at 895-900, 859 P.2d at 1043-46 (J. Springer, dissenting).

Based upon Canape and Clemons v. Mississippi, 494 U.S. 738 (1990), a "harmless error" analysis is possible when an error occurs *viz.* an **issue of death-eligibility**. For example, in a hypothetical capital prosecution, if the Notice of Intent to Seek the Death Penalty listed four aggravating circumstances, the penalty jury found all four and no mitigating circumstances, and one of the aggravators was found

to be invalid, the Nevada Supreme Court could decide that a "score of 3-0" makes one just as "death eligible" as a "score of 4-0," and could find such an error to be harmless. But Nevada's attorney general's position doesn't implicate that scenario: Rather, she wants this Court to hold that where an error is made on a **deathworthiness** issue, and it is impossible from the record to determine what degree of weight the capital jury placed on the erroneous "deathworthy" information in returning the death penalty verdict, that nevertheless the federal court of appeals on review can and should engage in a "harmless error" analysis. As we shall show, Nevada's attorney general's position is not only unsupported by any authority, it is contradicted by every authority considering or marginally considering the issue.

B. A REVIEWING FEDERAL COURT SHOULD NEVER BE REQUIRED TO CONDUCT A HARMLESS ERROR ANALYSIS UPON FINDING THAT AN EXECUTIVE CLEMENCY INSTRUCTION TO A NEVADA JURY IS UNCONSTITUTIONAL

Brecht v. Abrahamson, *ante*, was not a capital murder case, and therefore its holding is necessarily limited to "guilt phase" or "trial" issues. Brecht arises out of the use of post-arrest silence, and whether such an error has a "substantial and injurious effect or influence in determining the jury's verdict." Brecht clearly addresses the issue of "constitutional harmless error" in a non-capital trial; nothing in Brecht begins to address how to assess a "deathworthy error" during the penalty hearing of a capital murder trial.

Statements of this Court in other opinions, however, suggest strongly that error as to a "deathworthy" issue in a penalty hearing is not subject to a harmless error analysis, but rather, is structural

error.

In Penry v. Lynaugh, 492 U.S. 302, 109 S.Ct. 2934, 106 L.Ed. 2d 256 (1989), this Court stated:

> In contrast to the carefully defined standards that narrow a sentencer's discretion to **impose** the death sentence, the Constitution limits a State's ability to narrow a sentencer's discretion to consider relevant evidence that might cause it to **decline to impose** the death sentence. McCleskey v. Kemp, 481 U.S. 279, 304 . . . (1987)(emphasis in original). Indeed, it is precisely because the punishment should be directly related to the personal culpability of the defendant that the jury must be allowed to consider and give effect to mitigating evidence relative to a defendant's character or record or the circumstances of the offense. Rather than creating the risk of an unguided emotional response, full consideration of evidence that mitigates against the death penalty is essential that the juries give a 'reasoned **moral** response to the defendant's background, character and crime.' Franklin [v. Lynaugh, 487 U.S. 164, 184, 108 S.Ct. 2320, 2333, 101 L.Ed. 2d 155 (1988) (O'Connor, J., concurring in judgment) . . .] In order to insure 'reliability in the determination that death is the appropriate punishment in a specific case,' Woodson [v. North Carolina, 428 U.S. 280 (1976)], the jury must be able to consider and give effect to any mitigating evidence relevant to a defendant's background and character or the circumstances of the crime.
>
> Penry, 492 U.S. at 327-28, 109 S.Ct. at 2951-52.

And, in Eddings v. Oklahoma, 455 U.S. 104, 102 S.Ct. 869, 71 L.Ed. 2d 1 (1982), this Court held that exclusion of evidence which should have been admitted at the penalty phase could not be considered harmless. In citing to Lockett v. Ohio, 438 U.S. 586 (1978), this Court stated:

> Just as the State may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, **as a matter of law**, any relevant mitigating evidence. In this instance, it was as if the trial judge had instructed a jury to disregard the mitigating evidence Eddings proffered on his behalf. The sentencer and the Court of Criminal Appeals on review, may determine the weight to be given relevant mitigating evidence. But they may not give it no weight by excluding such evidence from their consideration.
>
> Eddings, 455 U.S. at 113-15, 102 S.Ct. at 876-77.

Moreover, even if an appellate court could engage in a "harmless error" analysis of a "deathworthy" issue, the United States Court of Appeals for the Ninth Circuit would not be the one to do so. Where reweighing is appropriate, it is the state court's duty to do so; one cannot "imply" that the state court did so, if it does not appear clearly in the state court's opinion. Sochor v. Florida, 504 U.S. 527, 539-40, 112 S.Ct. 2114, 2123, 119 L.Ed. 2d 326 (1992). Here, the Nevada Supreme Court did not even consider NRS 213.1099 in Gallego v. State, 101 Nev. 782, 711 P.2d 856 (1985), cert. denied, 479 U.S. 871 (1986). As appears clearly at the short discussion on this point at 101 Nev. at 789, 711 P.2d at 861-62, the Nevada Supreme Court did not find the executive clemency instructions given to be "harmless error," but rather, to be "no error."

Moreover, even if the federal court of appeals could "reweigh" a non-weighing "deathworthiness" factor, in lieu of the state court of appeals, notwithstanding all of the authority to the contrary, this would not be the case in which reweighing would bear any fruit for the Conditional Cross-petitioners. An argument made to the Court below, but not reached by it, was as follows: Amongst the 12 jurors who were seated, 7 jurors expressed the opinion during *voir dire* that a finding of guilt as to first degree murder would preclude or probably preclude his/her decision of life imprisonment with the possibility of parole. (See: ER 33: 68-71; ER 34: 247-48; ER 36: 619; ER 33: 101; ER 36: 640-46; ER 36: 595; ER 35: 433, 437; and ER 36: 708). In Nevada, the "penalty jury" is the same 12 people as the "guilt phase jury," and is picked at the beginning of the trial. NRS

175.552(1); 175.021. Pursuant to Morgan v. Illinois, 509 U.S.719, 112 S.Ct. 2222, 2235, 119 L.Ed. 2d 492 (1992), it was constitutional error to allow jurors to sit who were not inclined from the get-go to return one of the three available penalty verdicts. Although Morgan was decided in 1992, Morgan is not a "new rule" to this case because, citing Witherspoon v. Illinois, 391 U.S. 510, 522 (1968), this Court noted in Boulden v. Holman, 394 U.S. 478, 89 S.Ct. 1138, 22 L.Ed. 2d 443 (1969) that prospective jurors must be willing to consider **all** of the penalties provided by state law and that they may not be irrevocably committed before the trial has begun to reject **any one**. Boulden, 394 U.S. at 482-83, 89 S.Ct. at 1140. However, this jury had over half of its members committed to returning either verdicts of death or life without the possibility of parole, only, from the get-go. The executive clemency instructions herein told this jury that if it returned a verdict of life without the possibility of parole, such a judgment could be commuted by the Pardons' Board, and such a commutee could thereby be paroled and on the streets within ten years of imposition of the sentence. This combination of factors meant that, to over half of Gallego's jury, death was the only realistic option. In view of the blatant Morgan/Boulden constitutional error, which has never yet been addressed by any reviewing court, how any reviewing court could conclude that the "executive clemency" instruction error here is harmless is completely unfathomable. Certainly, Conditional Cross-petitioners do not begin to discuss this point in their Conditional Cross-petition.

Finally, in an attempt to obtain *certiorari* based upon an alleged

conflict in opinions, the Conditional Cross-petitioners suggest that the Nevada Supreme Court's opinions on the subject matter are in conflict, at pages 8-9 of the Conditional Petition. That is simply not so.

In both Rogers v. State, 101 Nev. 457, 705 P.2d 664 (1985), cert. denied, 476 U.S. 1130 (1986) and in Petrocelli v. State, 101 Nev. 46, 692 P.2d 503 (1985), there is nothing indicating that those capital appellants were either not eligible or not likely for either executive clemency or release on parole pursuant thereto, if they received life without the possibility of parole sentences. In both cases, the Nevada Supreme Court indicated that it was troubled by the clemency instruction actually given, but nowhere in either opinion did the Nevada Supreme Court state that the instruction was either inaccurate or misleading. See: Rogers, 101 Nev. at 468-69, 705 P.2d at 672; Petrocelli, 101 Nev. at 54-56, 692 P.2d at 509-11.

In contrast, however, in Geary v. State, 112 Nev. 1434, 930 P.2d 719 (1996), the Nevada Supreme Court vacated the death penalty because the executive clemency instruction given there, although complying with the Nevada Supreme Court's directive of the appropriate executive clemency instruction to give per Petrocelli, was unconstitutional – ultimately, for the same reason that it was unconstitutional in this case; per the terms of NRS 213.1099(4), at the time Geary was convicted, he was not eligible for parole, even if the sentence was commuted. 930 P.2d at 724. The instruction, coupled with the prosecutor's argument, mislead the jury into believing that, in order to avoid the specter of Geary's being released into society, had to

choose death. 930 P.2d at 725.

Interestingly, as support for its conclusion in Geary, the Nevada Supreme Court relied on an executive clemency opinion decided less than two months prior to Gallego, or Jones v. State, 101 Nev. 573, 707 P.2d 1128 (1985). There, the Nevada Supreme Court vacated the death penalty on that appellant, finding that the jury may have imposed the death sentence therein arbitrarily and under the influence of passion, based upon the prosecutor's suggestion to the jury that a sentence of life without the possibility of parole could be commuted, but a sentence of death could not. The latter statement was inaccurate, and thus, the argument as a whole was misleading. Jones, 101 Nev. at 580-81, 707 P.2d at 1133-34.

Taken together, Rogers, Petrocelli, Geary and Jones stand for this simple proposition: An executive clemency instruction which is neither inaccurate nor misleading is not unconstitutional; but an executive clemency instruction which is either inaccurate or misleading is. As we shall next show, that is also precisely the state of federal law. There is simply nothing inconsistent with how the Nevada Supreme Court has handled this issue, except in Gallego at 101 Nev. 782, but the handling there was corrected at 124 F.3d 1065.

C. THIS COURT SHOULD NOT GRANT CERTIORARI ON CONDITIONAL CROSS-PETITIONER'S ASSERTION THAT THE COURT OF APPEALS INCORRECTLY DETERMINED THAT THE EXECUTIVE CLEMENCY INSTRUCTION GIVEN HEREIN VIOLATED THE EIGHTH AMENDMENT

Very frankly, in spite of the length of the Ninth Circuit's published opinion at 124 F.3d 1065, that court's handling of most of the issues was quite summary. The exception was this issue – the

one and only issue upon which Gallego's position was found to be meritorious – and the Ninth Circuit rendered a very thorough, considered opinion.

The bottom line of the Ninth Circuit's journey through the jurisprudence of this issue is that, prior to the final state court disposition herein in December 1985, the hallmark of a constitutional executive clemency instruction is one that is accurate and not misleading. See: Caldwell v. Mississippi, 472 U.S. 320, 342, 105 S.Ct. 2633, 2646, 86 L.Ed. 2d. 231 (1985). [J. O'Connor, concurring]. Conditional Cross-petitioners would have this Court hold that an executive clemency instruction which is technically not an incorrect statement of the law, but which nevertheless is misleading in terms of its import, does not violate the constitution as long as it and the prosecutor do not expressly invite the jury to speculate upon its meaning, and thereby return a death penalty verdict as a result of the misimpression created thereby. But, as the Ninth Circuit noted, at 124 F.3d at 1075, this type of thinking simply has not passed muster with this Court in cases such as Gardner v. Florida, 430 U.S. 349 (1977), and Jurak v. Texas, 428 U.S. 262 (1976), as well as Ramos v. California, 463 U.S. 992 (1983) and Caldwell, *ante*.

Conditional cross-petitioners have further set up their argument to say that, in order to grant Gallego habeas relief, the Ninth Circuit in fact applied the "new rule" of Simmons v. South Carolina, 512 U.S. 154, 114 S.Ct. 2187, 129 L.Ed. 2d 133 (1994), in violation of O'Dell v. Netherland, ___U.S.___, 117 S.Ct. 1969, 138 L.Ed. 2d 351 (1997). But the Ninth Circuit probably gave its greatest degree of reliance

upon Hamilton v. Vasquez, *ante*, a case which predated Simmons and in any event, nowhere mentioned Simmons in order to reach its holding. Simmons involves a related but distinct issue of whether, when the jury is called upon to decide "future dangerousness" of the capital petitioner, it is constitutional error not specifically to advise the jury that a life sentence means without possibility of parole. But, Caldwell is actually the more applicable authority of this Court, and Caldwell predates Gallego's conviction by several months. For that matter, many years ago the Nevada Supreme Court also noted that prosecutorial arguments, whether regarding parole eligibility or executive clemency, are not improper so long as they are accurate and not misleading. Bean v. State, 81 Nev. 25, 35-36, 398 P.2d 251, 257 (1965); Summers v. State, 86 Nev. 210, 213, 467 P.2d 98, 100 (1970).

And, the Ninth Circuit's handling of O'Dell was so exactly correct, that little need be added, over and above what was said at 124 F.3d at 1076.[2]

Ironically, the Nevada Supreme Court perfectly stated the "danger" of a misleading executive clemency instruction two months prior to handing down Gallego in Jones v. State, *ante*: The effect of an improper instruction or argument on executive clemency is that the penalty jury will erroneously believe that the sentence of "life

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[2]On the subject of Simmons, it should be noted that even though that capital petitioner physically and sexually assaulted three elderly women before killing a fourth, the plurality of this Court refused to engagein a Brecht review of the error committed *viz.* future dangerousness. The point of the dissent was not that "harmless error" was committed, but that no constitutional error was committed.

without the possibility of parole" is not really a viable sentencing alternative because such a sentence might be commuted and the defendant thereafter might be released into society. Jones, 101 Nev. at 579-81; 707 P.2d 1132-34. We say "ironically," because NRS 213.1099 was in effect at the time Gallego was decided, yet the Nevada Supreme Court nowhere mentioned either that statute or Jones in its opinion. Obviously, that is the reason that prosecutors seek to have "executive clemency" instructions given; and equally as obviously, they don't seek to have them given so that the jury can ignore them and not think about what they may mean. And, in this case, what with over half the jury selected being in favor of no possibility of any release of a convicted first degree murderer ever occurring under any circumstance, one has to know that that is **exactly** why this prosecutor sought to have this instruction given, and why the defense counsel made such a big issue out of it. To ignore this point is to divorce oneself from the reality of the situation.

VII. CONCLUSION

For the foregoing reasons, if this Court should grant Mr. Gallego's Petition for Writ of *Certiorari* in Case No. 97-8160, this Court should nevertheless deny the Respondents and Conditional Cross-

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petitioners' Conditional Cross-petition.

DATED this 5 day of May, 1998.

Respectfully submitted,

LAW OFFICES OF RICHARD F. CORNELL
150 Ridge Street
Reno, Nevada 89501

BY: Richard F. Cornell
Richard F. Cornell,
Attorney for Petitioner and
Conditional Cross-respondent

A

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GERALD ARMOND GALLEGO, Petitioner-Appellant. vs. E. K. McDANIEL, et al., Respondents-Appellees.	Case No. 96-99006 D.C. No. CV-N-93-631-HDM (Nevada, Reno)

Appeal from the United States District Court
for the District of Nevada

ANSWERING BRIEF OF APPELLEES

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At trial, GALLEGO did not show good cause in support of his motion to continue his trial. As a result, there was not an abuse of discretion for the failure to grant his motion for continuance nor was there a violation of due process. However, should this court determine that the trial court abused its discretion, this error does not rise to the level of a federal due process error because his trial was not arbitrary or fundamentally unfair as GALLEGO pointed to no witnesses below who, but for time limitations prior to and during trial, could have been produced.

G. The Federal District Correctly Denied Federal Habeas Relief On The Claim Presented In Ground Ten Of The Instant Federal Petition.

GALLEGO alleged in ground ten that:

> The trial court denied petitioner a fair penalty hearing and due process of law by instructing the jury at the penalty hearing that executive clemency was available to a person sentenced to life without possibility of parole.

At the penalty phase of GALLEGO's trial, the jury received the following instructions:

Instruction No. 5, in its entirety, states:

> The punishment of death may be imposed only if one or more of the aggravating circumstances are found and any mitigating circumstance or circumstances which are found do not outweigh the aggravating circumstance or circumstances.
>
> Otherwise, the punishment imposed shall be imprisonment in the state prison for life with or without the possibility of parole.
>
> You are instructed that the sentence of life imprisonment without the possibility of parole does not exclude executive clemency.

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> If the punishment is fixed at life imprisonment with the possibility of parole, eligibility for parole begins when a minimum of ten years has been served.
>
> Instruction No. 6
>
> Executive clemency involves a decision by the State Board of Pardon Commissioners to commute or reduce a defendant's sentence from life without possibility of parole to life with possibility of parole.
>
> Executive clemency may also involve a decision by the State Board of Pardon Commissioners to shorten the time a defendant is eligible for parole.
>
> The State Board of Pardon Commissioners consists of the Governor, the Attorney General,and the five Justices of the Supreme Court of the State of Nevada. The Board can change a sentence only by a majority vote, and only if the Governor is in the majority voting to change the sentence.

CR 66, Exhibit 222(B) at 2036. At trial, GALLEGO objected to Penalty Instruction No. 6 on the basis that the law as stated in the instruction could possibly be changed by public referendum. In his petition, GALLEGO shifted the focus of his arguments to whether the instruction adequately explained Nevada law on executive clemency. CR 1, CR 36.

"In analyzing whether a sentencing phase instruction violates the Eighth Amendment, a court must determine if there is a reasonable likelihood that the jury applied the instruction in such a way that prevented consideration of relevant mitigating evidence." Hamilton v. Vasquez, 17 F.3d 1149, 1160 (9th Cir.) cert. denied sub nom. Calderon v. Hamilton, 114 S.Ct. 2706 (1994) (citing Boyde v. California, 494 U.S. 370, 380 (1990)). Thus, if a penalty phase instruction "prevents the jury from giving a reasoned moral response to the petitioner's mitigating evidence,

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or creates the risk that the death penalty would be imposed despite evidence which may call for a life sentence," it violates the eighth amendment. Id. (citations omitted). In Hamilton, the Ninth Circuit found constitutional error in a lengthy instruction on commutation that was designed to correct a misleading instruction which was given concurrently. The court found the combination of instructions to be unacceptable because they were confusing and forced the jury to speculate on the likelihood of commutation. Id. at 1163. GALLEGO did not argue below that the executive clemency instruction given to the jury at the sentencing phase of his trial misstated the law. Rather, he contended that it was misleading because it failed to adequately and accurately explain how remote the possibility of parole would be in his case. CR 36 at 79-80. In Nevada, the parole board (as distinguished from the pardons board) may not release a prisoner who has his life sentence commuted to include the possibility of parole unless,

> it finds that the prisoner has served at least 20 consecutive years in the state prison, is not under an order that he be detained to answer for a crime or violation of parole or probation in another jurisdiction, and that he has no history of:
>
> (a) Recent misconduct in the institution, and that he has been recommended for parole by the director of the department of prisons;
>
> (b) Repetitive criminal conduct;
>
> (c) Criminal conduct related to the use of alcohol or drugs;
>
> (d) Repetitive sexual deviance, violence or aggression; or

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(e) Failure in parole, probation, work release or similar programs.

NRS 213.1099-4 (provision enacted 1981 Nev. Stat. 873).

Although the Penalty Instruction No. 6 failed to explain the intricate limitations on the parole of a prisoner with a commuted sentence, it was not so inaccurate or misleading that this court finds it reasonably likely that the jury failed to consider relevant mitigating factors. Each statement in the instructions accurately stated the law. An instruction which contains all of the factors relevant to clemency and parole runs the risk of unduly focusing the jury's attention on those issues, thereby encouraging the jurors to speculate on the likelihood that the defendant's sentence would be commuted. And where a clemency instruction is allowed to inform the jury that a sentence of life without the possibility of parole is subject to executive clemency, brevity is valued. See generally Hamilton, 17 F.3d at 1160, 1162, 1163 (repeatedly noting the "two-sentence instruction" approved in California v. Ramos, 463 U.S. 992 (1983)).

Hamilton is distinguishable from this case. In that case, the instruction at issue began with the two-sentence clemency instruction approved by the United States Supreme Court in Ramos. Hamilton, 17 F.3d at 1161-62. However, the instruction went on to partially discuss a limitation on the commutation power for twice-convicted felons. It also inaccurately suggested that the imposition of any life sentence would cause Hamilton to be eligible for parole in less than seventeen years. Id. Further, the disapproved instruction cautioned the jury not to speculate on the likelihood that Hamilton would be pardoned or paroled. Id.

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On these facts, the court found that the "jury . . . was diverted from [the task of considering relevant mitigating evidence] by having its attention focused on commutation procedures rather than the significant mitigating evidence defense counsel introduced at the penalty phase." Id. at 1163.

Although Penalty Instruction No. 6 did discuss the composition of the Nevada State Board of Pardon Commissioners and that a sentence can be changed only by a majority of the Pardons Board which must include the governor, it did not urge the jury to speculate on the possible votes. Neither did the instruction inaccurately suggest that any life sentence would automatically lead to parole eligibility.

In addition to the objectionable content of the instruction, the Hamilton court found that "[t]he probability of the jury's improper speculation was compounded by the prosecutor's inappropriate assertion in closing argument that Hamilton, if sentenced to prison, would be conniving and devising ways to manipulate the system and get out." 17 F.3d at 1162. In closing argument, the prosecution relied on "inflammatory and largely irrelevant letters written by Hamilton" to support its contention. Id. The prosecutor in GALLEGO's trial did not engage in such conduct.

GALLEGO contends that Instruction No. 5 was inaccurate because it stated that if the punishment is fixed at life imprisonment with the possibility of parole, eligibility for parole begins when a minimum of ten years has been served. GALLEGO states that it is inaccurate because NRS 213.1099-4 requires that GALLEGO serve a minimum of 20 years. GALLEGO's

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statement is false and a deliberate attempt to mislead this Court. Had the jury imposed a sentence of life with the possibility of parole as stated by the instruction, GALLEGO would have been eligible for parole within ten years as stated by the instruction. NRS 200.030, 1977 Statutes of Nevada 864. In his brief GALLEGO has deliberately misinterpreted NRS 213.1099-4 to suggest that if the jury sentenced him to life with the possibility of parole, NRS 213.1099-4 would apply and GALLEGO would have to serve 20 years before he was eligible for parole, contrary to the instruction. That suggestion is false. NRS 213.1099-4 would apply only if GALLEGO had been sentenced to life imprisonment without the possibility of parole and the pardons board (as distinguished from the parole board) and had commuted his sentence to a sentence allowing parole, i.e., life with the possibility of parole and the parole board was going to consider parole.

H. The Federal District Court Correctly Denied Federal Habeas Relief On His Claim Advanced In Ground Fourteen Of The Petition.

GALLEGO alleged in ground fourteen that:

> Petitioner was deprived of [the] effective assistance of counsel, in that trial counsel failed to challenge the contingent, revocable plea bargain of the alleged accomplice as violative of due process of law.

Plea bargains are often contingent upon an agreement that the beneficiary will testify against others. See United States v. Moody, 778 F.2d 1380, 1385, amended 791 F.2d 707 (9th Cir. 1986). Further, where a plea agreement requires the witness to testify truthfully and completely, the agreement is not so coercive that it violates due process simply because the benefit is contingent

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B

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

GERALD ARMOND GALLEGO, Petitioner-Appellant. vs. E. K. McDANIEL, et al., Respondents-Appellees.	Case No. 96-99006 D.C. No. CV-N-93-631-HDM (Nevada, Reno)

Appeal from the United States District Court
for the District of Nevada

ANSWERING BRIEF OF APPELLEES

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Cartwright, in light of the crimes and the nature of the crimes and GALLEGO's prior criminal record, would not have resulted in a different sentence. Having failed to establish that presentation of such evidence probably would have resulted in a lesser sentence, GALLEGO cannot establish that trial counsel was ineffective for failing to present such evidence, and, thus, cannot establish prejudice to overcome procedural default. The federal district court properly found that ground 39 was procedurally barred.

M. If This Court Should Find Error, Such Error Is Harmless.

If this Court should find error, Respondents respectfully submit that any such error is harmless. Further, respondents submit that this court should apply the harmless-error standard enunciated in Brecht v. Abrahamson, ____ U.S. ____, 113 S.Ct. 1710 (1993). In Brecht, the United States Supreme Court held that the standard for determining whether habeas relief must be granted is whether the Doyle error "had substantial and injurious effect or influence in determining the jury's verdict." If this Court should find error, this Court should determine whether the error had a substantial and injurious effect or influence in determining the jury's verdict.

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aggravating circumstances sufficiently specific to render terms "torture," "depravity of mind" and "mutilation" not unconstitutionally vague. Deutscher v. Whitley, 682 F. Supp. 1098 (D. Nev. 1988)

Depravity instruction not equivalent to insanity instruction and not constitutionally improper. NRS 200.033 provides that first degree murder may be aggravated if jury finds that murder involved torture, depravity of mind or mutilation of victim. On petition for writ of habeas corpus, petitioner contended that depravity instruction unconstitutionally allowed jury to find aggravating circumstance from fact that defendant was unable to tell difference between right and wrong or to appreciate value of human life. Court found that instruction was not equivalent to insanity instruction because insanity instruction requires defendant to suffer from mental disease or defect which prevented him from understanding right and wrong. Depravity instruction merely requires that there be condition of mind that defendant lacks moral sense and possesses evil or vile state of mind. Therefore, there was no constitutional impropriety in using petitioner's depraved state of mind as aggravating circumstance against him. Deutscher v. Whitley, 682 F. Supp. 1098 (D. Nev. 1988)

Jury instruction concerning aggravating circumstance of depravity of mind was unconstitutional. Jury instruction concerning aggravating circumstance of depravity of mind (see NRS 200.033) that failed to channel and limit jury's discretion in imposing death penalty did not sufficiently minimize risk of wholly arbitrary and capricious action and was unconstitutional. Deutscher v. Whitley, 884 F.2d 1152 (9th Cir. 1989), cited, Baal v. State, 106 Nev. 69, at 74, 787 P.2d 391 (1990)

NRS 200.035 Circumstances mitigating first degree murder. Murder of the first degree may be mitigated by any of the following circumstances, even though the mitigating circumstance is not sufficient to constitute a defense or reduce the degree of the crime:

1. The defendant has no significant history of prior criminal activity.
2. The murder was committed while the defendant was under the influence of extreme mental or emotional disturbance.
3. The victim was a participant in the defendant's criminal conduct or consented to the act.
4. The defendant was an accomplice in a murder committed by another person and his participation in the murder was relatively minor.
5. The defendant acted under duress or under the domination of another person.
6. The youth of the defendant at the time of the crime.
7. Any other mitigating circumstance.

(Added to NRS by 1977, 1543)

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WESTLAW Topic No. 203.
C.J.S. Homicide §§ 367, 368.

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Death penalty was not cruel and unusual punishment. Death penalty imposed pursuant to NRS 175.552 et seq., 200.033 and 200.035 was not cruel and unusual punishment and did not offend either U.S. Constitution or Nevada constitution (see Nev. Art. 1, § 6). Bishop v. State, 95 Nev. 511, 597 P.2d 273 (1979), cited, Deutscher v. State, 95 Nev. 669, at 677, 601 P.2d 407 (1979), Lenhard v. Wolff, 443 U.S. 1306, 100 S. Ct. 3 (1979), Rogers v. State, 101 Nev. 457, at 465, 705 P.2d 664 (1985), Ford v. State, 102 Nev. 126, at 138, 717 P.2d 27 (1986), see also Nevius v. State, 101 Nev. 238, 699 P.2d 1053 (1985), Williams v. State, 103 Nev. 227, 737 P.2d 508 (1987)

Effect of disregarding defendant's mental and physical impairments as mitigating circumstances. At penalty hearing, pursuant to NRS 175.558, for defendant convicted of murder of first degree, panel of three judges did not improperly disregard defendant's various mental and physical impairments in finding that no mitigating circumstances (see NRS 200.035) existed which were sufficient to outweigh aggravating circumstances, because, after considering evidence, panel could have reasonably found that defendant's mental condition was only character disorder which did not bar imposition of penalty of death. Farmer v. State, 101 Nev. 419, 705 P.2d 149 (1985), cited, Baal v. State, 106 Nev. 69, at 74, 787 P.2d 391 (1990)

Comments concerning youth of defendant not improper at penalty hearing. Prosecutor's comments at penalty hearing for murder of first degree (see NRS 175.552) regarding defendant's

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the prosecuting attorney, before the commencement of the trial, files and serves upon the defendant a written notice of his intention to request such a hearing.

2. A hearing requested pursuant to subsection 1 must be conducted before:

(a) The court imposes its sentence; or

(b) A separate penalty hearing is conducted.

3. At the hearing, only evidence concerning the question of whether the offense was sexually motivated may be presented. The prosecuting attorney must prove beyond a reasonable doubt that the offense was sexually motivated.

4. The court shall enter its finding in the record.

5. For the purposes of this section, an offense is "sexually motivated" if one of the purposes for which the person committed the offense was his sexual gratification.

(Added to NRS by 1995, 413; A 1997, 1666)

PENALTY HEARING FOR FIRST DEGREE MURDER

NRS 175.552 Requirement; jury; panel of judges; evidence; waiver.

1. Except as otherwise provided in subsection 2, in every case in which there is a finding that a defendant is guilty of murder of the first degree, whether or not the death penalty is sought, the court shall conduct a separate penalty hearing. The separate penalty hearing must be conducted as follows:

(a) If the finding is made by a jury, the separate penalty hearing must be conducted in the trial court before the trial jury, as soon as practicable.

(b) If the finding is made upon a plea of guilty or guilty but mentally ill or a trial without a jury and the death penalty is sought, the separate penalty hearing must be conducted before a panel of three district judges, as soon as practicable.

(c) If the finding is made upon a plea of guilty or guilty but mentally ill or a trial without a jury and the death penalty is not sought, the separate penalty hearing must be conducted before the judge who conducted the trial or who accepted the plea, as soon as practicable.

2. In a case in which the death penalty is not sought, the parties may by stipulation waive the separate penalty hearing required in subsection 1. When stipulating to such a waiver, the parties may also include an agreement to have the sentence, if any, imposed by the trial judge. Any stipulation pursuant to this subsection must be in writing and signed by the defendant, his attorney, if any, and the prosecuting attorney.

3. In the hearing, evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, defendant or victim and on any other matter which the court deems relevant to sentence, whether or not the evidence is ordinarily admissible. Evidence may be offered to refute hearsay matters. No evidence which was secured in violation of the Constitution of the United States or the constitution of the State of Nevada may be introduced. The state may introduce evidence of additional aggravating circumstances as set forth in NRS 200.033, other than the aggravated nature of the offense itself, only if it has been disclosed to the defendant before the commencement of the penalty hearing.

4. In a case in which the death penalty is not sought, the jury or the trial judge shall determine whether the defendant should be sentenced to life with the possibility of parole or life without the possibility of parole.

(Added to NRS by 1977, 1543; A 1993, 322; 1995, 258, 2451)

IN THE SUPREME COURT OF THE UNITED STATES

GERALD ARMOND GALLEGO,

Petitioners,

vs.

E. K. McDANIEL, Warden, Ely State Prision; ROBERT BAYER, Director, Nevada Department of Prisons; FRANKIE SUE DEL PAPER, Attorney General of the State of Nevada,

Resondents.

_____/

Case No. 97-1632

CERTIFICATE OF SERVICE

I, RICHARD F. CORNELL, the attorney of record for Petitioner GERALD ARMOND GALLEGO in the above-entitled proceeding, does hereby certify that, on the 5 day of May, 1998, I caused to have copies of the BRIEF OF CROSS-RESPONDENT IN OPPOSITION TO THE CONDITIONAL CROSS-PETITION FOR A WRIT OF *CERTIORARI* TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT mailed as noted below in duly addressed envelopes, with first-class postage prepaid, to each person below. All of the following parties have been served and this mailing occurred within the time permitted under the Rules of the Supreme Court of the United States.

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